

DECISIONS

COMMISSION DECISION

of 20 September 2011

on the measure C 35/10 (ex N 302/10) which Denmark is planning to implement in the form of duties for online gambling in the Danish Gaming Duties Act

(notified under document C(2011) 6499)

(Only the Danish text is authentic)

(Text with EEA relevance)

(2012/140/EU)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to those provisions⁽¹⁾ and having regard to their comments,

Whereas:

Both complaints were forwarded to the Danish authorities on 23 September 2010 for their comments. The Danish authorities submitted their comments in their letter of 20 October 2010.

(3) A meeting with the Danish authorities to discuss the notification and the two complaints referred to above took place in Brussels on 10 November 2010. During the meeting the Danish authorities submitted a note entitled 'The dilemma created by the pending State aid case' in which they also announced their intention to delay the entry into force of the notified Act until the Commission had adopted a decision⁽³⁾.

(4) By decision of 14 December 2010, the Commission informed Denmark that it had decided to initiate the procedure laid down in Article 108(2) TFEU in respect of the notified measure. The Commission decision to initiate the procedure (hereinafter the 'initiating decision') was published in the *Official Journal of the European Union* ⁽⁴⁾. The Commission invited interested parties to submit comments.

(5) The Danish authorities submitted their observations on the initiating decision by letter of 14 January 2011.

(6) In total, 17 interested third parties submitted comments between 11 February and 22 February 2011⁽⁵⁾. These comments were forwarded to Denmark on 16 March 2011, which was given the opportunity to respond. The Commission received Denmark's comments by letter dated 14 April 2011.

1. PROCEDURE

(1) On 6 July 2010, pursuant to Article 108(3) of the Treaty on the Functioning of the European Union (TFEU) the Danish authorities notified the Legislative Proposal L 203 on Gaming Duties (the 'Gaming Duties Act'⁽²⁾), adopted on 25 June 2010, for the sake of legal certainty. The Commission requested further information by letters dated 11 August 2010 and 22 September 2010. The Danish authorities provided the requested information by letter dated 20 October 2010.

(2) The Commission also received two separate complaints with regard to the proposed Gaming Duties Act. The first was submitted by the Danish Amusement Machine Industry Association ('DAB') on 23 July 2010. The second complaint was submitted by a land-based casino operator, 'the Royal Casino', on 6 August 2010.

⁽¹⁾ OJ C 22, 22.1.2011, p. 9.

⁽²⁾ Act No 698 on Gaming Duties ('*Lov om afgifter af spil*').

⁽³⁾ Although the notified measure was initially due to enter into force on 1 January 2011, in order to comply with the State aid provisions, Article 35, paragraph 1 of the Gaming Duties Act provides that the Minister of Taxation will set the date for the Act's entry into force.

⁽⁴⁾ See footnote 1.

⁽⁵⁾ See below, Section 5.

2. DESCRIPTION OF THE MEASURE

- (7) Following the initiation of infringement proceedings and the sending of a reasoned opinion on 23 March 2007 concerning obstacles to the free movement of sports betting services in Denmark ⁽⁶⁾, the Danish government had decided to reform the national legislation on gambling and betting services and to replace the existing monopoly regime with a regulated and partially liberalised one. The liberalisation was considered necessary, *inter alia*, to comply with EU law and to respond to the threat posed by illegal online gambling services provided by gaming service providers located in other jurisdictions.
- (8) The notified Gaming Duties Act is part of a set of Acts introduced to liberalise the gambling sector ⁽⁷⁾. Under the terms of Article 1 of the Gaming Act, the overall objective of this new law reform for gambling services is:
- to keep gambling consumption at a moderate level,
 - to protect young persons and other vulnerable persons from exploitation or from becoming addicted to gambling,
 - to protect gamblers by ensuring that gambling is supplied in a reasonable, reliable and transparent manner, and
 - to ensure public order and prevent gambling being used for criminal purposes.
- (9) Under the Gaming Act, 'supplying or arranging gambling requires a licence unless this Act or other legislation provides otherwise'. In addition, the provision or arranging of gambling is subject to the payment of duty (Article 1 of the Gaming Duties Act).
- (10) Article 5 of the Gaming Act defines gaming as covering the following activities: (i) lotteries, (ii) combination gambling, and (iii) betting.
- (11) Combination gambling refers to 'activities where a participant has a chance to win a prize, and where the likelihood of winning depends on a combination of skill and chance'. Combination gambling thus includes games that are often offered by casinos, such as roulette, poker, baccarat, blackjack, and gaming machines offering cash winnings.
- (12) Article 5 of the Gaming Act defines online gambling as 'gambling entered into between a player and a gambling provider using remote communication'. The same provision defines land-based gambling as 'gambling that is entered into by a player and a gambling supplier, or the suppliers' agent, meeting physically'. Betting services are defined as 'activities where a participant has a chance of winning a prize and where a bet is placed on the result of a future event or the occurrence of a future event'.
- (13) Under the terms of Articles 2-17 of the Gaming Duties Act, the games subject to duty are (i) lotteries, including class lotteries and non-profit lotteries, (ii) betting, including local pool betting, (iii) land-based casinos, (iv) online casinos, (v) gaming machines offering cash winnings in amusement arcades or restaurants, and (vi) games without stakes.
- (14) The Gaming Duties Act sets different tax rates, depending on whether the games are provided in online casinos or in land-based casinos.
- (15) Under Article 10 of the Gaming Duties Act, holders of a licence to provide games in land-based casinos are subject to a basic charge of 45 per cent of their gross gaming revenues ('GGR' — stakes minus winnings), less the value of the tokens in the *tronc*, and an additional charge of 30 per cent for GGR (less the value of the tokens in the *tronc*) which exceeds DKK 4 million (calculated on a monthly basis) ⁽⁸⁾.
- (16) Under Article 11 of the Gaming Duties Act, holders of a licence to provide games in an online casino are subject to a charge of 20 per cent of their GGR.
- (17) Holders of a licence to provide gaming machines offering cash winnings (slot machines) in amusement arcades and restaurants are subject to a charge of 41 per cent of their GGR. An additional 30 per cent is paid on gaming machines in public houses, bars, etc. for GGR exceeding DKK 30 000, and on gaming machines in amusement arcades for GGR exceeding DKK 250 000 ⁽⁹⁾.
- (18) With regard to the licence fees, the Gaming Act provides that anyone applying for a licence to offer betting or online casino games is liable to a fee of DKK 250 000 (DKK 350 000 if they apply for both betting and online casino games) and a yearly licence fee ranging from DKK 50 000 up to DKK 1 500 000 depending on the gaming revenues.

⁽⁶⁾ Infringement proceedings No 2003/4365. See also IP/07/360.

⁽⁷⁾ Act on Gaming (No 848 of 1 July 2010); Act on the Distribution of Profits Stemming from Lotteries and Horse and Dog Racing (No 696 of 25 June 2010); Act laying down a Statute governing Danske Spil A/S (Act No 695 of 25 June 2010).

⁽⁸⁾ 1 Danish krone (DKK) ≈ EUR 0,13.

⁽⁹⁾ Under Article 12 of the Gaming Duties Act, the following amounts are additionally levied per month: DKK 3 000 per machine for up to 50 machines and DKK 1 500 for machines beyond that number.

- (19) The Gaming Act requires online gambling providers either to be established in Denmark, or if they are residents of another EU or EEA Member State, to nominate an approved representative (Article 27).

3. REASONS FOR OPENING THE PROCEDURE

- (20) The Commission opened the formal investigation procedure laid down in Article 108(2) of the TFEU in respect of the measure at issue on the grounds that it might entail State aid within the meaning of Article 107(1) TFEU.

- (21) In particular, the Commission considered that the measure could be regarded as selective in the light of case law. It recalled that any assessment of the selectivity of a tax measure should involve examining whether a given measure favours certain undertakings in comparison with other undertakings whose legal and factual situation is comparable in the light of the objective pursued by the scheme in question ⁽¹⁰⁾.

- (22) Given the nature of the games offered online and in land-based establishments, the social experience provided by gaming of both types, and the socio-economic profiles of the consumers, the Commission had doubts as to whether the differences between online and land-based gambling were substantial enough to consider them not to be comparable in law and in fact for the purposes of their tax treatment under the Gaming Duties Act.

- (23) Furthermore, at that stage of the procedure, the Commission took the view that should the measure be considered *prima facie* to be selective, the Danish authorities had failed to establish that the measure could be justified by the logic of the tax system.

- (24) In this regard, the Danish authorities argued that the tax rate for online gambling reflected the necessary balance between meeting the aims of the Danish gambling legislation in order to protect players on the one hand, and being able to face the competition from online operators established in other countries with lower tax rates on the other.

- (25) In addition, regarding the reference made by the Danish authorities to the overall objectives pursued by the Gaming Act (see paragraph 8), the Commission took the view that these objectives appeared to be of a

general nature and external to the tax system. Since it is established case-law that only intrinsic objectives of the tax system are pertinent, the Commission considered that the Danish authorities had not sufficiently substantiated their claim that the selectivity of the tax measure at issue was required by the logic of the tax system.

- (26) Moreover, the Commission took the view that the notified Act involved a tax advantage conferred through the use of State resources since foregoing tax revenue gave online gambling operators an advantage in the form of a substantially lower rate of duty. In addition, to the extent that the measure provides a selective economic advantage to online operators operating in Denmark, it could affect trade in the internal market and distort competition.

- (27) Finally, the Commission expressed its doubts as to whether the notified measure could fall within the scope of any of the derogations laid down in Article 107(2) and 107(3) TFEU.

4. COMMENTS FROM THE DANISH AUTHORITIES

- (28) By letter dated 14 January 2011, the Danish authorities submitted their comments on Commission's decision to initiate proceedings.

Comments regarding the comparability of online and land-based casinos

- (29) The Danish authorities, relying on a list of factual and economic differences between online and land-based gambling set out in their notification, reiterated the view that online gambling should be regarded as an activity that is different from land-based gambling.

- (30) According to the Danish authorities, the software used in certain electronic games offered in land-based casinos and those used in online casinos is not identical. Besides the fact that the platforms and suppliers are not the same, it was argued that there are major differences between these electronic games since the physical presence of gamblers is required in order to play them in land-based casinos. Physical presence entails various costs (e.g. for transportation, entrance fees, cloakroom fees, food or drink) which are not incurred in online gambling.

- (31) For the Danish authorities, the fact that a number of Member States prohibit online gambling while allowing land-based gambling services reflected the differences involved in providing the two types of gaming.

⁽¹⁰⁾ See paragraphs 73 ff. of the initiating Decision.

(32) Furthermore, the Danish authorities contended that the Commission had not taken account of the conclusions of its 2006 'Study of Gambling Services in the Internal Market of the European Union' ⁽¹¹⁾, according to which online and land-based casinos should be considered as being distinct markets.

(33) The Danish authorities also stressed that the Commission's assessment focused only on land-based casinos and did not take account of gambling machines (i.e. slot machines, but not roulette, blackjack, poker, etc.) located in land-based restaurants or amusement arcades and gaming halls.

Comments regarding *prima facie* selectivity being justified by the logic of the tax system

(34) With regard to the justification for the measures by virtue of the logic of the tax system, the Danish authorities claim that the Commission might have misinterpreted the objective of the notified measure. This measure is not aimed at preserving the international competitiveness of the Danish gaming industry, but rather at pursuing the four objectives set out in the legislation (maintaining gambling at a moderate level; protecting young people or other vulnerable persons from being exploited through games or from developing an addiction of gambling; protecting players by ensuring that games are offered in a fair, responsible, and transparent manner; ensuring public order and preventing gaming being used for criminal purposes).

(35) With regard to the different tax rates for online and land-based gambling, the Danish authorities explained that they are confronted with a legislative and regulatory dilemma. On the one hand, they could no longer maintain the current monopolistic situation and delay liberalisation of the online gambling market. On the other hand, providing for a uniform tax level for online and land-based gambling activities would undermine the policy objectives pursued by the government in this field.

(36) In particular, the Danish authorities argued that setting a uniform tax level for all gambling activities would lead to inconsistent solutions, regardless of the tax model opted for. Opting for a model based on a lower, uniform 20 per cent tax rate would give a strong incentive to gamble in land-based casinos, which would be contrary to the general interest of consumer protection.

(37) Conversely, a model based on a higher uniform tax rate similar to that applied to land-based gambling would dissuade online operators from seeking a licence to

provide services from Denmark, thus defeating the liberalisation objectives of the law. This would also be contrary to the general interest of consumer protection since no effective control of online gambling would be possible.

(38) In support of their position, the Danish authorities submitted a memorandum from the Ministry of Taxation of 6 March 2010 to the Policy Spokesmen of the political parties of the Danish Parliament concerning the level of duty to be set ⁽¹²⁾. The memorandum shows that the current differential tax treatment should be regarded as the result of a balancing exercise aimed, on the one hand, at ensuring that the law is upheld, while on the other hand maximising the tax revenue and keeping gambling to a moderate level.

(39) In this connection, the Danish authorities considered that international competition and the global nature of the online gambling industry should also be taken into account. In this regard, the Danish authorities referred to the 'Study of Gambling Services in the Internal Market of the European Union', according to which the costs of doing business onshore for suppliers should not exceed the costs of doing business offshore, in order to be more attractive for consumers and suppliers to operate within their jurisdictions than in other countries ⁽¹³⁾.

(40) Furthermore, the Danish authorities argued that the principle laid down by the Court of Justice in the *Salzgitter* case, according to which the Commission should not compare the notified level of taxation with levels applicable in other Member States in order to determine whether the notified measure constitutes State aid ⁽¹⁴⁾, does not apply to the notified Act, since the

⁽¹²⁾ For an English version of the memorandum, see Annex B to the Danish authorities' observations of 14 January 2011 on the initiating decision. The Danish version of the memorandum can be found in Annex 20 to the Danish authorities' notification of 6 July 2010.

⁽¹³⁾ Swiss Institute of Comparative Law, Study of Gambling Services in the Internal Market of the European Union, European Commission 2006, Chapter 7, p. 1402.

⁽¹⁴⁾ Case T-308/00 *Salzgitter v Commission of the European Communities* [2004] ECR II-1933, paragraph 81. The wording of this paragraph is as follows: 'Consequently, in order to identify what constitutes an advantage as contemplated in the case-law on State aid, it is imperative to determine the reference point in the scheme in question against which that advantage is to be compared. In the present case, when a "normal" tax burden with the meaning of the aforementioned case laws is being determined, comparing the tax rules applicable in all of the Member States, or even some of them, would inevitably distort the aid and functioning of the provisions on the monitoring of State aid. In the absence of Community-level harmonisation of the tax provisions of the Member States, such an approach would in effect compare different factual and legal situations arising from legislative and regulatory disparities between the Member States. The information provided by the applicant in the present case illustrates, moreover, the disparity which exists between the Member States, particularly as regards tax bases and rates of taxation on capital goods.' Commission Decision C2/09 *MoRaKG, Conditions for Capital Investment* (OJ C 60, 14.3.2009, p. 9), paragraph 25.

⁽¹¹⁾ Swiss Institute of Comparative Law, Study of Gambling Services in the Internal Market of the European Union, Final Report, European Commission, 2006, http://ec.europa.eu/internal_market/services/docs/gambling/study1_en.pdf

differential tax treatment between land-based and online gambling activities is based exclusively on internal tax considerations. In particular, the Danish government took no account of the tax rates applicable in other Member States so as to enhance the competitiveness of the Danish gaming industry, but merely sought to strike an appropriate balance with the four aforementioned policy objectives of the notified Act.

- (41) Moreover, the Danish authorities argued that the Commission had misinterpreted the *Salzgitter* case, as it had relied on it not in order to assess the selective nature of the notified measure but in order to examine whether the selectivity of the notified measure could be regarded as justified.
- (42) For the above reasons, the Danish authorities consider that the notified tax measure, if it were found to be selective, should be regarded as justified by the logic of the tax system.

5. COMMENTS FROM THIRD PARTIES

- (43) The Commission received comments from 17 interested third parties, including the complainants: seven of them were associations⁽¹⁵⁾, seven were undertakings⁽¹⁶⁾ and three were Member States⁽¹⁷⁾.

Comments from third parties supporting the Danish authorities' position

- (44) With regard to the selectivity of the measure, some of the interested parties claim that online and land-based casinos are not in a comparable legal and factual situation because these undertakings do not operate in the same market and, consequently, the tax measure does not depart from the generally applicable tax system. Hence, the tax measure should not be regarded as selective.
- (45) In support of this position, the interested third parties claim that the products offered by land-based and online

casinos differ substantially. The activities offered by land-based casinos constitute a social experience where, unlike online gambling, discussion, appearance, and physical environment are a central part of the gaming experience. Furthermore, land-based gambling should be regarded as part of the overall entertainment experience, which is complemented by other activities, such as are offered by restaurants, bars, convention facilities, and hotel services.

- (46) In addition, those interested parties argue that online and land-based gambling activities do not present the same risks of addiction. Support for this position can be found in the case-law of the Court of Justice of the European Union, which held that 'the offer of games of chance by the Internet may prove to be a source of risks of a different kind and a greater order in the area of consumer protection'⁽¹⁸⁾. Reference is also made to the study on gambling published by the *Institut National de la Santé et de la Recherche Médicale*⁽¹⁹⁾, according to which online gambling presents an actual risk of addiction that needs, however, to be addressed by a regulated market for online gambling.

- (47) Moreover, some interested parties argued that there is a segmentation of the gambling market based on different distribution channels, which would constitute a pertinent element for distinguishing different relevant markets. In that respect, they refer to an opinion of the French competition authority of 20 January 2011, which noted that online gambling could be differentiated from gambling in clubs or outlets⁽²⁰⁾.

- (48) Some of the interested parties also pointed out that land-based gambling operators are subject to a limited competitive pressure in the specific geographic area where they offer their games. By contrast, online operators would face fierce competition from other online operators. In particular, since the gaming products in land-based casinos are bound to a physical location, customers need to physically move to get to the relevant location. For instance, in Denmark, there are only six locations where land-based casinos can operate. By contrast, online gambling activities allow players to access a great number of gaming line-ups offered by different international operators. Moreover, the strong competition for online casinos is all the more exacerbated by the existence of specialised websites that compare the offer of various online gambling providers, and by numerous blogs and forums that allow players to compare the products, prices and services offered by online operators.

⁽¹⁵⁾ European Gaming and Betting Association (EGBA), Remote Gambling Association (RGA), *Automatenverband*, *Eupportunity*, *Van Speelautomaten*, Danish Chamber of Commerce and European Casino Association (ECA).

⁽¹⁶⁾ PokerStars, Betfair, Club Hotel Casino Loutraki, Royal Casino (along with DAB), BWin, Compu-Game, nine casinos in Greece (Club Hotel Casino Loutraki, Regency Casino Parnes, Regency Casino Thessaloniki, Casino Xanthi (Vivere Entertainment S.A.), Casino Rio (Theros International gaming INC.), Casino Corfu (Greek Casino Corfu), Casino Rodos, Porto Carras Grand Resort 20 and Casino Syrou).

⁽¹⁷⁾ Estonia, France and Spain.

⁽¹⁸⁾ Case C-46/08 *Carmen Media Group*, [2009], not yet published, paragraph 103.

⁽¹⁹⁾ *Institut national de la santé et de la recherche médicale*, *Jeux de hasard et d'argent — Contextes et addictions*, July 2008, <http://lesrapports.ladocumentationfrancaise.fr/BRP/084000697/0000.pdf>

⁽²⁰⁾ *Autorité de la concurrence française*, *Avis 11-A-02 du 20 janvier 2011*.

- (49) At the same time, these interested parties point out that profit margins associated with online gambling are significantly lower than those associated with land-based gambling, given the fierce competition among online operators and the absence of such competition between land-based casinos. Thus, online casinos would have significantly lower margins with regard to the payout ratio, i.e. the percentage of the wagered amounts that is credited back to customers. Moreover, land-based casinos can offer other side-products and so benefit from side-earnings such as casino hotels, bars, or restaurants, which are absent in an online environment. Consequently, since land-based gambling operators could generate higher gambling profit than online operators, the difference in tax rates would be justified by the principle of the 'financial capacity to pay', according to which those who can bear a higher tax burden should pay higher taxes.
- (50) Besides the aforementioned arguments, some interested parties also argued that even if the Danish measure were found to be selective, the selectivity criterion would be justified by the nature and general scheme of the tax system. The aim of the Danish differential tax rate was to ensure that online operators would apply for a Danish licence and thus pay Danish taxes in the future, whilst at the same time guaranteeing that the objectives of consumer protection, as laid down in the Danish gambling legislation, would be achieved.
- (51) In this connection, some interested parties referred to the 1998 Commission Notice on the application of the State aid rules to measures relating to business taxation⁽²¹⁾, according to which the whole purpose of a tax system is the collection of revenue for State expenditure. On this basis, they take the view that the objective of optimising tax revenue from providing online gambling to Danish residents would otherwise not be achieved with a tax rate higher than the rate laid down for online gambling under the notified Act.
- Comments from third parties against the Danish authorities' position
- (52) In contrast to the aforementioned arguments, other third parties — mainly land-based operators — submitted comments against the stance adopted by the Danish authorities.
- (53) In substance, these interested parties argued that the Danish tax regime should be regarded as selective since it introduces a difference in tax treatment between two groups of undertakings which are in a legal and factual situation that is comparable in the light of the objectives of the measure. These parties allege that the online and land-based casinos carry out competing activities in the one and the same market and they are therefore in comparable situations.
- (54) In support of this position, the interested parties claim that that the games provided by online and land-based casinos are similar. The rules of casino games should be regarded as the same, and virtual interactions with croupiers or other players online are comparable with real interactions in land-based casinos. Manufacturers of land-based gambling machines would produce the same models for online use as for land-based use. Hence, from a technical point of view, casino games offered online and offline were identical in terms of technological platforms, descriptions, features, formats and parameters.
- (55) Furthermore, the interested parties allege that the consumer profiles of online and land-based casinos are comparable. Hence, the consumer aspect should not be used as a pertinent argument to distinguish online gambling from land-based gambling.
- (56) Some interested parties did not think online gambling should be regarded as a different activity from land-based gambling, but simply as another channel through which games are offered to players.
- (57) In addition to the aforementioned arguments, the interested parties take the view that the current gaming market should be viewed as a single market which is undergoing major change, marked by a substantial shift of players from land-based to online casinos. There are several possible reasons for this recent development, including the ever-increasing use of the Internet, the low operating costs of online casinos at all levels (facilities, staff, and fixed costs), the fact that online casinos can provide unlimited access to online gambling 24 hours per day anywhere given the ongoing development of new technologies.
- (58) The interested parties predict that this shifting of the market share from land-based to online gambling will increase in the future, given the rapid pace of technological progress, commercial initiatives, and the market penetration typical of e-commerce, which have made this sector of the gambling industry extremely dynamic and transformative. In this regard, they also refer to the opinion delivered by Advocate General Bot in the *Liga Portuguesa de Futebol Profissional* case⁽²²⁾ according to which, the impact of new means of communication is such that games of chance and gambling, which used to be available only in specific premises, could now be played at any time and any place, given the evolution of new technologies such as phones, interactive television and the Internet.

⁽²¹⁾ Commission Notice on the application of the State aid rules to measures relating to direct business taxation, OJ C 384, 10.12.1998, paragraph 26.

⁽²²⁾ Opinion of AG Bot (14 October 2008), Case C-42/07 *Liga Portuguesa de Futebol Profissional*, [2009] ECR I-10447, paragraphs 41 ff.

(59) Reference is also made to the 2006 Commission Study on Gambling Services in the Internal Market ⁽²³⁾. Accordingly, 'the future of gambling in casinos is increasingly going to be server-based as gaming machines move increasingly to downloadable game software' ⁽²⁴⁾. This development would be marked by the development of new hybrid gaming venues.

(60) On the basis of the foregoing argument the interested parties conclude that the measure is selective since online and land-based casinos carry out activities which are in a comparable situation in law and in fact. Nor could such selectivity be justified by the logic of the tax system. Moreover, they consider that imposing a higher tax rate would not discourage online providers to apply for a licence in Denmark.

(61) Moreover, the Danish reference to other Member States' national tax systems to justify the need to attract providers of online casinos is not pertinent since it is settled case-law that any justification should be based exclusively on the national tax system ⁽²⁵⁾. In addition, the Danish authorities' argument that lowering the tax rate applicable to certain undertakings is necessary in order to render the market more competitive, has consistently been rejected by the courts.

6. COMMENTS FROM DENMARK ON THIRD-PARTY COMMENTS

(62) While reiterating their views that the notified measure is not selective and does not constitute a State aid, the Danish authorities point out that all intervening governments support their position that there is a need, from a regulatory perspective, to draw a distinction between online and land-based casinos.

(63) They also point out that the methodology used to define the relevant market for the purposes of Articles 101 and 102 TFEU is intended for private undertakings and is based on an assessment of product substitutability from a demand and supply point of view, and therefore should not apply for the purpose of a State aid assessment. Applying this methodology would overstep the bounds of the State aid rules, which in the present case are being applied to a Member State's sovereign tax powers.

(64) In their view, online gambling should be set apart from land-based gambling. In this regard, they also refer to the Commission position adopted in merger proceedings, by virtue of which gambling machines (jackpot machines,

token machines and all-cash or amusements with prizes (AWPs)) constitute a separate product market ⁽²⁶⁾. They also mention, among others, the decision adopted by the French Competition Authority, according to which land-based poker does not form part of the same market as online poker, since land-based poker requires personal self-control, observation of the other players, often higher costs and a limitation from a geographic point of view ⁽²⁷⁾. Reference is also made to a merger decision adopted by the British Office of Fair Trading, which draws a distinction between licensed betting offices on the one hand, and telephone or Internet betting, on the other hand ⁽²⁸⁾.

(65) With regard to the differences in product markets, the Danish authorities point out that, according to many interveners, additional — and significantly more expensive — services are offered in gaming establishments. From a sociological point of view, the Danish authorities reiterated their view that remote and land-based players are different types of consumers, as also indicated in the Commission's recent Green Paper on Online Gambling in the Internal Market of 24 March 2011, which stated that the profile of online gamblers seems to be different from that of traditional casino or betting shop customers ⁽²⁹⁾.

(66) The Danish authorities also reiterate that the payout ratio is significantly higher for online operators, given their lower operating costs. They also point out that disparities between online and land-based casinos can be found in the technical aspects of the software used, the different regulations for granting licences, and the position of local dominance for land-based casinos.

(67) The Danish authorities also contest the interpretation by certain interested parties of the above-mentioned opinion delivered by Advocate General Bot in the *Liga Portuguesa* case. They point out that this opinion, which was issued in the context of the freedom to provide services, accords with the idea that remote gambling operators should be regarded as being in a different legal and factual situation from land-based gambling operators.

(68) However, the Danish authorities recognise that certain types of online gambling services could still constitute another form of sale, as in the case of betting services.

⁽²³⁾ Swiss Institute of Comparative Law, Study of Gambling Services in the Internal Market of the European Union, European Commission 2006.

⁽²⁴⁾ *Ibid.*, p. 1403.

⁽²⁵⁾ Case T-308/00, *Salzgitter AG v Commission of the European Communities*, [2004] ECR II-1933, paragraph 81.

⁽²⁶⁾ Commission Decision of 14 March 2003, COMP/M.3109, *Candover/Cinven/Gala*, paragraph 16.

⁽²⁷⁾ *Autorité de la concurrence Avis n° 11-A-02 du 20 janvier 2011 relatif au secteur des jeux d'argent et de hasard en ligne*.

⁽²⁸⁾ Office of Fair Trading, Decision ME/1716-05 of 15 August 2005 regarding the acquisition by William Hill of the licensed betting offices of Stanley Plc.

⁽²⁹⁾ European Commission, Green Paper on Online Gambling in the Internal Market, COM(2011) 128 final, p. 3.

- (69) With regard to the aims of the notified Act, the Danish authorities reject the argument of certain interested parties that the notified Act is aimed at attracting foreign gambling providers. Rather, the objectives pursued by the government are the those listed in the Gaming Act. In addition, the general purpose of the new Act would remain unchanged, that is to generate income on gambling like any similar system for collecting revenue to finance the public budget.
- (70) The Danish authorities also agree with the view expressed by some interested parties that the taxable person's ability to pay could be regarded as a valid justification. In the present case, the financial capacity of online gambling operators would indeed be significantly lower.
- (71) Finally, the Danish authorities point out that their tax system on remote gambling is designed so as to ensure the best possible revenue yield. Thus, the lower tax rate for online gambling would reflect the need to balance the four objectives set out in the notified Act with the need to maximise tax revenue.

7. ASSESSMENT OF THE MEASURE

7.1. Existence of State aid under Article 107(1) TFEU

- (72) Under Article 107(1) TFEU, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is incompatible with the internal market if it affects trade between Member States.
- 7.1.1. *State resources*
- (73) Article 107(1) TFEU requires that the measure be granted by a Member State or through State resources. A loss of tax revenue is equivalent to consumption of State resources in the form of fiscal expenditure.
- (74) In the case under review, the presence of State resources has not been contested by any of the parties, neither the Danish authorities, the complainants, nor third parties.
- (75) By allowing online gambling operators to pay tax at the relatively low rate of 20 per cent of their GGR⁽³⁰⁾, the Danish authorities forego revenue which constitutes State resources. The Commission therefore takes the view that the measure at issue involves a loss of State resources and is therefore granted through State resources.

⁽³⁰⁾ See paragraphs 15 and 16 above.

7.1.2. *Advantage*

- (76) The measure also has to confer a financial advantage on the recipient. The notion of advantage covers not only positive benefits but also interventions which, in various forms, mitigate the charges normally borne by an undertaking's budget⁽³¹⁾.
- (77) In the present case, the existence of an advantage has not been challenged by any of the parties, neither the Danish authorities, the complainants, nor third parties.
- (78) Under the Gambling Duties Act, online gambling undertakings are liable to pay tax on their GGR at a rate 20 per cent. This rate is substantially lower than the rate applicable to land-based gambling operators. Therefore, online gambling undertakings benefit from an advantage in the shape of a lower tax burden. It follows that the measure under review involves an advantage for undertakings providing online gambling services.

7.1.3. *Distortion of competition and effect on trade*

- (79) Under the terms of Article 107(1) TFEU, the measure must affect intra-EU trade and distort, or threaten to distort competition. In the present case, online gambling providers who establish themselves in Denmark will be exposed to competition and will be involved in intra-community trade. Consequently, the Gaming Duties Act, which provides for favourable tax treatment of Danish undertakings supplying online gambling services, necessarily affects intra-Community trade and distorts or threatens to distort competition.

7.1.4. *Selectivity*

- (80) In order to be regarded as a State aid within the meaning of Article 107(1) TFEU, the measure should be found selective inasmuch as it favours certain undertakings or the production of certain goods.
- (81) The established interpretation of selectivity in case law is that a measure is selective if it is 'intended partially to exempt those undertakings from the financial charges arising from the normal application of the general system of compulsory contributions imposed by law'⁽³²⁾. It follows that the measure is selective if

⁽³¹⁾ Case 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg v High Authority of the European Coal and Steel Community* [1961] ECR 3, p. 19.

⁽³²⁾ Case 173/73 *Italian Republic v Commission of the European Communities* [1974] ECR 709, Summary No 3.

it constitutes a departure from the application of the general tax framework. According to existing case law, what has to be assessed is whether a given measure favours certain undertakings over other undertakings whose legal and factual situation is comparable in the light of the objective pursued by the scheme in question ⁽³³⁾.

- (82) Under case law, if the measure is considered to depart from the general tax system, it has to be examined to determine whether that differentiation results from the nature or general scheme of the tax system of which it forms part ⁽³⁴⁾. In other words, the question is whether the measure concerned, which appears *prima facie* to be selective, is justified in the light of the logic of the tax system ⁽³⁵⁾.

System of Reference

- (83) In the present case, the reference system should be defined as the taxation system for Danish gambling activities. The Gaming Duties Act aims at regulating the payment of duties on all gambling activities provided or arranged in Denmark, be it online or through land-based activities. It is therefore against this reference tax system that the measure at issue (i.e. the differential tax treatment in favour of online gambling activities) should be assessed.

Departure from the general tax system

- (84) Since the notified Act provides that holders of a licence to provide games in online casinos are subject to a charge of 20 per cent of the GGR, whereas holders of a licence to provide games in land-based casinos are subject to a basic charge of 45 per cent of GGR and an additional charge up to 30 per cent of GGR, the question arises as to whether online and land-based gambling operators, which are subject to different tax duties, should be regarded as being legally and factually comparable.
- (85) In this regard, the Danish authorities have consistently argued that online and land-based gambling activities are not legally and factually comparable in terms of platforms, costs, financial margins, social experience, suppliers or products.

⁽³³⁾ Case C-88/03 *Portuguese Republic v Commission of the European Communities* [2006] ECR I-7115, paragraph 54; Case C-172/03 *Wolfgang Heiser v Finanzamt Innsbruck* [2005] ECR I-1627, paragraph 40; Case C-169/08 *Presidente del Consiglio dei Ministri v Regione Sardegna* [2009] ECR I-10821, paragraph 61.

⁽³⁴⁾ Case C-487/06 P *British Aggregates Association v Commission*, [2008] ECR-I-10515, paragraph 83.

⁽³⁵⁾ Case 173/73 *Italian Republic v Commission of the European Communities* [1974] ECR 709, paragraph 15; Commission Notice on the application of the State aid rules to measures relating to direct business taxation, OJ C 384, 10.12.1998, paragraph 23.

- (86) Furthermore, like other interested parties, they have emphasised the substantial difference between the two categories of operators by reference to the fierce competition faced by online casinos compared with the absence of competition encountered by land-based operators.

- (87) Despite a number of objective differences between online and land-based gambling operators (such as physical versus online presence), the Commission considers that the aforementioned differences between online and land-based gambling casinos are not sufficient to establish a substantial and decisive distinction in law and in fact between the two types of undertakings.

- (88) In this regard, the Commission notes that the games offered by land-based and online gambling operators are equivalent. The games offered by both online and land-based operators — including roulette, baccarat, punto banco, blackjack, poker and gaming on gaming machines — form part of the same activity of gambling, regardless of their online or land-based settings. Moreover, from a technical point of view, casino games offered online and in land-based premises appear to be comparable in terms of the technological platforms, formats and parameters.

- (89) In that respect, the Commission considers that, as far as the taxation of gambling activities is concerned, online gambling emerges as another distribution channel of a similar type of gaming activities. In support of this position, the Commission notes the substantial efforts carried out by online casinos to simulate the land-based casino experience in such a way that online players feel as if they were playing in land-based casino surroundings, rather than in virtual environments.

- (90) In order to support their view that online and land-based gambling are legally and factually not comparable activities, the Danish authorities have referred, among others, to a decision by the British Office of Fair Trading drawing a distinction between licensed betting shops on the one hand and telephone or Internet betting on the other ⁽³⁶⁾. However, this reference contradicts the Danish authorities' position that online and offline betting are identical services ⁽³⁷⁾. In this regard, it is also contradictory that the Danish authorities should consider offline and online betting services to be similar activities and so subject them to the same tax treatment while regarding other types of online and land-based gambling activities as distinct activities and subjecting them to different tax rates.

⁽³⁶⁾ See footnote 28.

⁽³⁷⁾ Article 6 of the Gaming Duties Act.

(91) The Danish authorities also relied on the Candover-Cinven-Gala decision⁽³⁸⁾, which held that gambling machines (jackpot machines, token machines and all-cash or AWP) constituted an independent product market⁽³⁹⁾. However, apart from the fact that this decision did not concern the application of State aid rules nor the issue of selectivity, it must be noted that although the decision states that 'gaming machines (jackpot machines, token machines and all-cash or amusement with prize (AWP) machines) constitute a separate product market, it also states that they can be regarded as integrated in the gambling package at the respective sites where they are situated, i.e. in casinos, bingo clubs, arcades, pubs, betting shops etc.'⁽⁴⁰⁾.

(92) The alleged differences in the socioeconomic profiles of consumers, addiction risks, or market evolution are likewise insufficient to demonstrate that online and land-based gambling constitute two different types of activities that are not legally and factually comparable. Some of the studies relied upon by the Danish authorities and the complainants alike, appear to contain enough findings to support opposing conclusions. Thus, with regard to the 2006 Commission Study on Gambling Services in the Internal Market⁽⁴¹⁾, the Danish authorities claim that the study tends to show that online and land-based markets are separate⁽⁴²⁾. By contrast, the same report is cited by some interested parties⁽⁴³⁾ to show that the online gambling market should not be regarded as a new market but rather as the evolution of the same gambling market, marked by the development of new hybrid gaming venues⁽⁴⁴⁾.

(93) Likewise, contradictory statements are found in the study carried out by the Danish National Centre for Social Research⁽⁴⁵⁾, which is cited by the Danish authorities and the complainants. Whereas the Danish authorities claim that gamblers in land-based casinos differ from those in online casinos in terms of age, gender and education level, the complainants, relying on the same study, come to the opposite conclusion, claiming that the study demonstrates that there are no major distinctions between the profiles of the consumers playing in land-based or online casinos. In their view, the study shows that gamblers playing games both in land-based and online casinos would typically be the same young men between 18 and 24 years old⁽⁴⁶⁾.

⁽³⁸⁾ See paragraph 64 above.

⁽³⁹⁾ See footnote 26.

⁽⁴⁰⁾ *Ibid.*

⁽⁴¹⁾ Swiss Institute of Comparative Law, Study of Gambling Services in the Internal Market of the European Union 2006.

⁽⁴²⁾ See answers to request for information sent by the Danish authorities, 20 October 2010, paragraph 2.10; Observations sent by the Danish authorities, 14 January 2011, p. 9, paragraph 42.

⁽⁴³⁾ See comments from the Danish Amusement Machine Industry Association and Royal Casino, sent on 18 February 2011, p. 1.

⁽⁴⁴⁾ *Ibid.*, p. 1403.

⁽⁴⁵⁾ Study by the Socialforskningsinstituttet (National Centre for Social Research), 2007.

⁽⁴⁶⁾ See for instance the observations sent by nine Greek casinos, 21 February 2011, p. 18.

(94) On the basis of the foregoing, the Commission concludes that online and land-based casinos should be perceived as legally and factually comparable. As both online and land-based gambling pose the same risks, the notified measure addresses both online and land-based gambling. The measure at issue introduces differential tax treatment favouring online gambling operators to the detriment of land-based casinos. It follows that the measure under review should be regarded *prima facie* as selective within the meaning of article 107 TFEU, since it constitutes a departure from the general tax regime.

Justification by the logic of the tax system

(95) Whether a measure that appears *prima facie* to be selective can be justified by the nature and general scheme of the system has to be assessed in the light of existing case law. The guiding principles or rationales of the tax system can be relied upon to justify the selectivity of the measure.

(96) In this regard, the Danish authorities argued that, given the peculiarities of the sector involved, the differential tax treatment in favour of online gambling operators constitutes the only way to ensure the efficiency of their tax regime. Setting a higher tax rate would discourage online gambling operators from applying for a Danish licence, whereas introducing a lower tax burden for all operators concerned would be contrary to the overall objective of keeping gambling at a reasonable level.

(97) The Danish authorities have also asserted that the financial capacity of online gambling operators, being allegedly lower than that of land-based casino operators, justified the different tax rates between the two categories of operators.

(98) In the light of the foregoing arguments, the Commission recalls that, according to case law⁽⁴⁷⁾ and the Commission Notice on the application of the State aid rules to measures relating to direct business taxation⁽⁴⁸⁾, a Member State has to establish whether the measure under consideration derives from the basic or guiding principles of that system. A justification based on the nature or overall structure of the tax system in question constitutes an exception to the principle that State aid is prohibited. It must therefore be subject to a strict interpretation⁽⁴⁹⁾.

⁽⁴⁷⁾ Case 173/73 *Italian Republic v Commission of the European Communities* [1974] ECR 709, paragraph 15.

⁽⁴⁸⁾ Commission Notice on the application of the State aid rules to measures relating to direct business taxation, OJ C 384, 10.12.1998, paragraph 23.

⁽⁴⁹⁾ Joined Cases T-127/99, T-129/99 and T-148/99 *Diputación Foral de Álava and others v Commission* [2002] ECR II-1275, paragraph 250.

(99) It follows that it is incumbent upon the Danish authorities to prove that the tax measure in question is justified by the logic of the tax system. However, the Danish authorities did not adduce any sufficient and convincing evidence to support their assertion that lowering the tax rate for a particular segment (online operators) of a wider category (gambling operators) as a means to ensure that the former would apply for a license derives from the principles and the logic underpinning their tax system. In particular, the objective of attracting foreign online gambling service providers in Denmark and making them subject to the Danish rules should be regarded as a public policy objective that falls outside the logic of the tax system.

(100) Likewise, with regard to online gambling operators' alleged lower capacity to pay, the Danish authorities failed to establish that there is a difference in profitability between online and land-based casino activities that would justify the differential tax treatment. Nor have the Danish authorities demonstrated that the financial capacity to pay is a principle embedded in their system of direct business taxation that could be relied upon in the present case as a justification for the differential tax treatment of online and land-based casinos.

(101) It follows from the foregoing that the Commission does not consider that the selectivity of the notified Act is justified in the light of the logic of the tax system.

7.1.5. Conclusion

(102) In the light of the foregoing, the Commission considers that the criteria set out in Article 107(1) TFEU are fulfilled and that the measure imposing a lower tax rate on online gambling constitutes State aid for the providers of online gambling services established in Denmark.

7.2. Compatibility of the measure on the basis of Article 107(3)(c) TFEU

(103) Article 107(2) and (3) of the Treaty on the Functioning of the European Union lay down rules stipulating when certain aid measures are compatible with the internal market and what types of aid may be considered to be compatible with the internal market.

(104) The Commission considers that the measure at issue can be declared compatible with the internal market under the derogation provided for in Article 107(3)(c) TFEU, which allows '... aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest.'

(105) The Commission notes that the measure does not fall within the scope of existing guidelines for the application of Article 107(3)(c) of the TFEU. It therefore has to be assessed directly under this Treaty provision. To be compatible under Article 107(3)(c) TFEU, an aid measure must pursue an objective of common interest in a necessary and proportionate way. When assessing a measure's compatibility with the internal market, the Commission balances its positive impact in terms of attaining an objective of common interest against its potentially negative side effects, such as distortion of trade and competition. This test is based on a three-stage examination. The first two stages address the positive effects of the State aid and the third stage deals with the negative effects and the resulting balance of positive and negative effects⁽⁵⁰⁾. The test is structured as follows:

- (1) Does the aid measure have a well-defined objective of common interest?
- (2) Is the aid well suited to attain the objective of common interest i.e. does the proposed aid address a market failure or other objective? In particular:
 - (a) is the aid measure an appropriate instrument, i.e. are there other, better placed instruments?
 - (b) is there an incentive effect, i.e. does the aid change the behaviour of potential beneficiaries?
 - (c) is the aid measure proportional, i.e. could the same change in behaviour be obtained with less aid?
- (3) Are the distortions of competition and effect on trade limited, so that the overall balance is positive?

7.2.1. Objective of common interest

(106) The Danish authorities explained that they decided to proceed with a reform of the existing legislation on gambling and betting services in order to replace the existing monopoly regime with a regulated and partially liberalised regime. Liberalisation was considered necessary, *inter alia*, to comply with EU law following the initiation of infringement proceedings and the issuing of a reasoned opinion on 23 March 2007⁽⁵¹⁾, and to respond to the threat posed by illegal online gambling services provided by gaming service providers located in other countries.

⁽⁵⁰⁾ In this regard, see State Aid Action Plan — Less and better targeted State aid: a roadmap for State aid reform 2005-2009, COM(2005) 107 final.

⁽⁵¹⁾ See footnote 6.

- (107) Up to now the Danish gambling sector has essentially been a State monopoly as only one licence has been issued to a state-controlled company, 'Danske Spil A/S'. Despite the regulatory framework prohibiting foreign online gambling providers from marketing their services to consumers resident in Denmark, many online gambling providers established in other Member States and also in third countries have offered their services via channels not located in Denmark, such as satellite television channels broadcast from the UK. The Danish authorities stated in their notification that they could not in practice enforce the prohibition against other gaming service providers marketing their services in Denmark because of Danish court proceedings in which it was claimed that the current Danish gambling monopoly constituted a restriction of the free movement of services. As a result, an unsatisfactory situation persisted whereby the legality of the existing monopoly was challenged not only in administrative and judicial proceedings but also through the direct supply of online gambling services by unlicensed operators established in other jurisdictions.
- (108) According to explanatory memorandum accompanying the Gaming Act, the liberalisation process was justified by reference to the latest technological developments, which meant that Denmark was now part of a global communication society where consumers have access to a wide range of services from providers of various jurisdictions. Over the past 10 years, gaming has developed into a major sales product on the Internet, especially after the introduction of online poker. The Internet has provided Danish citizens with the opportunity to compare Danske Spil's products and product range with the products offered by online gambling providers established in the UK, Malta, Gibraltar and other countries. In recent years a rapidly growing number of Danes have begun to gamble with the international gaming providers. As explained by the Danish authorities, the government's fear was that the provision of gaming, if not regulated and controlled effectively, could be linked with negative effects on society in the form of crime and a breakdown of public order, and could cause vulnerable individuals to become addicted to gambling. At the same time, the profits of Danske Spil have been steadily declining. The Danish authorities therefore needed to be able to regulate and control the gaming offered to Danish citizens in order to channel gaming into a controlled framework and so prevent negative consequences for society.
- (109) In this connection, the Commission recalls that the gambling sector has never been subject to any harmonisation within the European Union. Under Article 2 of the Services Directive, gambling is even explicitly excluded from the Directive's scope⁽⁵²⁾. However, despite the lack of any kind of secondary legislation in this field, cross-border gambling activities may fall within the scope of the fundamental freedoms of the Treaty, namely the freedom of establishment (Article 49 TFEU) and the freedom to provide services (Article 56 TFEU).
- (110) In principle, Article 56 TFEU requires the abolition of all restrictions on the freedom to provide services, even if those restrictions apply without distinction to national providers of services and to providers from other Member States, if the restrictions are liable to prohibit, impede, or render less advantageous the activities of service providers established in another Member State where they lawfully provide similar services⁽⁵³⁾. It is also settled case law that legislation by a Member State prohibiting providers established in other Member States from offering services in the territory of that first Member State via the Internet constitutes a restriction of the freedom to provide services enshrined in Article 56 TFEU⁽⁵⁴⁾. Moreover, the freedom to provide services is for the benefit of both providers and recipients of services⁽⁵⁵⁾.
- (111) In the present case, although the provision of gambling services primarily falls under the scope of the fundamental freedom of Article 56 TFEU, the Danish legislation also affects the freedom of establishment. Under Article 27 of the Gaming Act, Denmark requires online gambling providers either to be established in Denmark or, if they are residents of another EU or EEA Member State, to appoint an approved representative. The justifications for the restrictions are the same for the freedom of establishment as for the freedom to provide services.
- (112) Restrictions on these fundamental freedoms are only acceptable as exceptional measures expressly provided for in Article 52 TFEU or justified, in line with the case law of the Court, for reasons of overriding general interest. Article 52(1) TFEU allows restrictions justified on grounds of public policy (*'ordre public'*), public security, or public health.
- (113) In so far as gambling activities are concerned, a certain number of reasons of overriding general interest have been recognised by the Court of Justice in its rulings, such as the objectives of consumer protection and the prevention of both fraud and incitement to squander on gaming, as well as the general need to preserve public order. In that context, moral, religious and cultural factors, and the morally and financially harmful consequences for the individual and society associated with gaming and betting, could serve to justify

⁽⁵²⁾ 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).

⁽⁵³⁾ Case C-76/90 *Säger* [1991] ECR I-4221, paragraph 12; Case C-58/98 *Corsten* [2000] ECR I-7919, paragraph 33.

⁽⁵⁴⁾ Case C-243/01 *Gambelli* [2003] ECR I-13031, paragraph 54.

⁽⁵⁵⁾ Joined Cases 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377, paragraph 16.

the existence on the part of the national authorities of a margin of appreciation sufficient to enable them to determine what consumer protection and the preservation of public order require. Accordingly, the restrictions must in any event be justified by imperative requirements in the general interest, must be suitable for achieving the objective they pursue, and must not go beyond what is necessary in order to attain it. They must also be applied without discrimination ⁽⁵⁶⁾.

(114) It should be noted, however, that loss of tax revenue is not one of the grounds listed in Article 52 TFEU nor accepted in case law ⁽⁵⁷⁾ and cannot therefore be regarded as an overriding reason in the public interest which could be relied upon to justify a measure which is, in principle, contrary to a fundamental freedom.

(115) As regards specifically the justification for restrictions on the provision of cross-border gambling, the Court of Justice has held as follows ⁽⁵⁸⁾:

‘57. In that context (...) it also should be noted that the legislation on games of chance is one of the areas in which there are significant moral, religious and cultural differences between the Member States. In the absence of Community harmonization in this field, it is for each Member State to determine those areas, in accordance with its own scale of values, what is required in order to ensure that the interest in question are protected.

58. The mere fact that a Member State has opted for a system of protection which differs from that adopted by another Member State cannot affect the assessment of the need for, and proportionality of, the provisions enacted to that end. Those provisions must be assessed solely by reference to the objectives pursued by the competent authorities of the Member State concerned and the degree of protection which they seek to ensure.

59. The Member States are therefore free to set the objectives of their policy on betting and gambling and, where appropriate, to define in detail the level of protection sought. However, the restrictive measures that they impose must satisfy the

conditions laid down in the case law of the Court as regards their proportionality (*Placanica and Others*, paragraph 48).

(...)

69. In that regard, it should be noted that the sector involving games of chance offered via the Internet has not been the subject of Community harmonisation. A Member State is therefore entitled to take the view that the mere fact that an operator (...) lawfully offers services in that sector via the Internet in another Member State, in which it is established and where it is in principle already subject to statutory conditions and controls on the part of the competent authorities in that State, cannot be regarded as amounting to a sufficient assurance that national consumers will be protected against the risks of fraud and crime, in the light of the difficulties liable to be encountered in such a context by the authorities of the Member State of establishment in assessing the professional qualities and integrity of operators.

70. In addition, because of the lack of direct contact between consumer and operator, games of chance accessible via the Internet involve different and more substantial risks of fraud by operators against consumers compared with the traditional markets for such games.’

(116) In a recent judgment, the Court also referred in detail to the risks of online gambling ⁽⁵⁹⁾:

‘103. It should be noted that, in the same way, the characteristics specific to the offer of games of chance by the Internet may prove to be a source of risks of a different kind and a greater order in the area of consumer protection, particularly in relation to young persons and those with a propensity for gambling or likely to develop such a propensity, in comparison with traditional markets for such games. Apart from the lack of direct contact between the consumer and the operator, previously referred to, the particular ease and the permanence of access to games offered over the Internet and the potentially high volume and frequency of such an international offer, in an environment which is moreover characterised by isolation of the player, anonymity and an absence of social control, constitute so many factors likely to foster the development of gambling addiction and the related squandering of money, and thus likely to increase the negative social and moral consequences attaching thereto, as underlined by consistent case-law.

⁽⁵⁶⁾ See Case C-243/01 *Gambelli* [2003] ECR I-13031, paragraphs 63 to 65 and Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica and Others* [2007] ECR I-1891, paragraphs 46 to 49.

⁽⁵⁷⁾ Case C-446/03 *Marks & Spencer* [2005] ECR I-10837, paragraph 44; Case C-319/02 *Manninen* [2004] ECR I-7477, paragraph 49 and the case-law cited. In so far as restrictions on gambling activities are concerned, see Case C-243/01 *Gambelli* [2003] ECR I-13031, paragraphs 61 and 62.

⁽⁵⁸⁾ Case C-42/07 *Liga Portuguesa de Futebol Profissional* [2009] ECR I-10447, paragraphs 57 ff.

⁽⁵⁹⁾ Case C-46/08 *Carmen Media Group* [2009] not yet published, paragraph 103.

104. Moreover, it should be noted that, having regard to the discretion which Member States enjoy in determining the level of protection of consumers and the social order in the gaming sector, it is not necessary, with regard to the criterion of proportionality, that a restrictive measure decreed by the authorities of one Member State should correspond to a view shared by all the Member States concerning the means of protecting the legitimate interest at issue (see, by analogy, Case C-518/06 *Commission v Italy* [2009] ECR I-3491, paragraphs 83 and 84).
105. Having regard to the whole of the above, it must be acknowledged that a prohibition measure covering any offer of games of chance via the Internet may, in principle, be regarded as suitable for pursuing the legitimate objectives of preventing incitement to squander money on gambling, combating addiction to the latter and protecting young persons, even though the offer of such games remains authorised through more traditional channels.'
- (117) The lack of harmonisation in the field of gambling and the Member States' different approaches regarding the range of games permitted and the operators authorised to offer them paints a picture of a very fragmented internal market for the provision of cross-border gambling services. While some Member States restrict or even ban the offer of certain games of chance, others have opted for more open markets. Many Member States have also recently reviewed their gambling legislation or are in the process of doing so in view of the growth of online gambling services.
- (118) The Danish authorities did not provide detailed figures on the size of illegal gambling by Danish residents, but instead they pointed out that the development of the unregulated online gambling sector was a worrying aspect from a societal perspective.
- (119) This trend is confirmed by the European Commission's Green Paper of March 2011⁽⁶⁰⁾. The accompanying Commission Staff Working Paper cites a total Gross Gaming Revenue for Online Gambling in Denmark of EUR 250 m in 2008, of which 14 % (i.e. EUR 34 m) related to casino games and 22 per cent (i.e. EUR 56 m) to poker⁽⁶¹⁾. By definition, both online casino games and online poker are prohibited activities.
- (120) These figures are expected to increase. The Green Paper reports that online gambling is the fastest growing segment of the gambling market, accounting for 7,5 per cent of the annual revenues of the overall gambling market in 2008 (EU-27) and it is expected to double in size by 2013⁽⁶²⁾. Second, the proportion of national gambling consumption attributable to online-gambling is estimated to be 21,9 per cent in Denmark, i.e. the second highest rate within the EU, which posts an average of 7,5 per cent⁽⁶³⁾.
- (121) Taking into consideration the above-mentioned case law, as well as the overall characteristics of the gambling market in the EU, the Commission takes the view that the arguments put forward by the Danish authorities to justify the adoption of the notified measure are well-founded. In particular, the Commission is aware of the peculiarities of the activities at issue: online gambling provided via the Internet has transformed the sector, bringing about a global marketplace where physical borders are blurred. In this context, as stated in the 2011 Green Paper⁽⁶⁴⁾, the Commission also notes the need to control the online gambling sector in order to prevent harmful negative consequences that online gambling can have on consumers. In addition to the significant risk of online gambling addiction that various social studies have established⁽⁶⁵⁾, special attention should be given to minors and other vulnerable persons, including players on low incomes, gamblers with previous gambling addiction and young adults unaware of the risks associated with gambling problems. In order to protect these categories of potential players, the Member States should be able to control the online gambling sector, amongst other things by imposing age limits or licence conditions, controlling payment processing systems and limiting marketing or promotion of online gambling.
- (122) The reform undertaken in Denmark, resulting in the adoption of the notified Act, is therefore in line with the objective of the European Commission's Green Paper of 24 March 2011 on 'On-line gambling in the Internal Market', which was to contribute to the emergence in the Member States of a legal framework for online gambling providing for greater legal certainty for all stakeholders⁽⁶⁶⁾. The Green Paper was a response to the Council Conclusions of December 2010 welcoming a broad consultation by the European Commission on online gambling in the internal market
-
- ⁽⁶⁰⁾ European Commission, Green Paper on Online Gambling in the Internal Market, COM(2011) 128 final, p. 8.
- ⁽⁶¹⁾ European Commission, Green Paper on Online Gambling in the Internal Market, Commission Staff Working Paper SEC(2011) 321, p. 10.
- ⁽⁶²⁾ See footnote 60.
- ⁽⁶³⁾ European Commission, Green Paper on Online Gambling in the Internal Market, Commission Staff Working Paper SEC(2011) 321, p. 9.
- ⁽⁶⁴⁾ European Commission, Green Paper on Online Gambling in the Internal Market, COM(2011) 128 final, p. 19.
- ⁽⁶⁵⁾ For further details on these studies, see European Commission, Green Paper on Online Gambling in the Internal Market, COM(2011) 128 final, pp. 19 ff.
- ⁽⁶⁶⁾ European Commission, Green Paper on Online Gambling in the Internal Market, COM(2011) 128 final, p. 7.

which would allow for an in-depth discussion of the issues raised by online gambling services in particular ⁽⁶⁷⁾ and to the resolution of the European Parliament adopted on 10 March 2009 that called on the Commission, working in close cooperation with national governments, to study the economic and non-economic effects of the provision of cross-border gambling services ⁽⁶⁸⁾. It must be stressed that the legislative reform implemented through the notified Act is in line with the objectives advocated by the Commission which led to the initiation of infringement proceedings and the sending of a reasoned opinion to the Danish authorities in March 2007 ⁽⁶⁹⁾.

- (123) For these reasons, the Commission considers that the notified Gaming Duties Act, to the extent that it will liberalise the market and allow Danish and foreign online gambling operators to provide their services to Danish residents, while ensuring that they will they fulfil the necessary conditions to be licensed by the Danish authorities, serves a well-defined objective of common interest.

7.2.2. Aid well suited for the desired objective

- (124) An aid measure is considered necessary and proportional when it constitutes an appropriate instrument to achieve the identified objective of common interest, when it has an incentive effect on the beneficiaries and when it does not introduce unnecessary distortions of competition.

Appropriate instrument

- (125) The Danish government decided to liberalise the Danish online gambling market and to allow an unlimited number of online licences to be issued. However, the issue of such a licence is subject to a number of conditions relating, *inter alia*, to the trustworthiness of the managers of the company applying for a licence. To make the liberalisation successful, the Danish government also decided to lower the taxation for online operators, only leaving intact the tax rates applicable to land-based gambling operators. In this regard, the complainants argued that lowering the tax rate for online operators was not the most appropriate solution. For instance, blocking payment and communication (ring-fencing instruments) could still be used to achieve the objectives of the liberalisation process without a need to introduce lower tax rates for online operators. According to the complainants, Denmark could therefore have chosen to enforce the prohibition of illegal online gambling by resorting to 'payment and

communication' blocking (domain name system filtering, Internet protocol blocking and payment blocking) or by limiting the number of licences to be issued.

- (126) With regard to the use of 'blocking systems', the Commission Green Paper states that the efficiency of blocking systems depends on a pre-defined and updated list of items to block as well as efficient software systems. However, as the Danish authorities pointed out, it is questionable whether these blocking systems could produce the expected results, since online gamblers could circumvent Internet blocking by changing the 'ports' used and prohibiting certain payments could block perfectly lawful commercial transactions other than payments relating to stakes and prizes.
- (127) With regard to the possibility of issuing a limited number of online licences, the effects depend on the numbers of licences to be issued. If the number is restricted to only a few licences, the small number of competitors will reduce competition and influence supply, which would mean a higher cost for consumers, in the form of a lower payout ratio, than with an unlimited number of licences. A reduced number of licences also limits the variety and quality of choice available to consumers in the marketplace and encourages producers to be less diligent in responding to consumer wants and needs ⁽⁷⁰⁾. Limiting the number of licences also raises questions regarding the criteria for determining the number of licences in a non-arbitrary manner, how and by which institutions the licensing requirements are monitored, and how illegal provision is dealt with, i.e. who takes what measures against illegally provided gambling services ⁽⁷¹⁾.
- (128) In view of these considerations, the Commission considers that the lower tax rate applicable to online gambling activities is an appropriate instrument to attain the liberalisation objectives of the new Gaming Act. The aid measure will ensure that online operators wishing to provide gambling services for Danish residents will apply for a licence and comply with the applicable national regulations.

Incentive effect

- (129) The Commission considers that the aid measure is capable of modifying the behaviour of foreign providers of online gambling services, since the lower tax rate constitutes an incentive for such operators to obtain a licence in Denmark and thus for the first time to provide online gambling services legally.

⁽⁶⁷⁾ Conclusion on the framework for gambling and betting in the EU Member States, adopted at the 3057th Competitiveness Council meeting, Brussels, 10 December 2010, Council document 16884/10.

⁽⁶⁸⁾ European Parliament resolution of 10 March 2009 on the integrity of online gambling. (2008/22125(INI)), P6-2009-0097. These issues include advertising and marketing, under-age persons, fraud and criminal behaviour and integrity, social responsibility, consumer protection and taxation.

⁽⁶⁹⁾ See paragraph 7 above.

⁽⁷⁰⁾ Swiss Institute of Comparative Law, Study of Gambling Services in the Internal Market of the European Union, European Commission 2006, p. 1108.

⁽⁷¹⁾ Swiss Institute of Comparative Law, *International Vergleichende Analyse des Glücksspielwesens*, 2009, p. 18. <http://mpk.rlp.de/mpkrlpde/sachthemen/studie-zum-gluecksspielwesen/>

Proportionality of the aid

(130) Aid is deemed proportionate only if the same change in behaviour could not be achieved with less aid and less distortion. The amount of the aid must be limited to the minimum needed for the aided activity to take place. In the present case, the Commission considers that the Danish authorities have designed the measure in such a way as to diminish the possible amount of State aid involved and to minimise the distortions of competition arising from the measure.

(131) In the memorandum submitted by the Danish Ministry of Taxation of 6 March 2010 to the Policy Spokesmen of the political parties of the Danish Parliament on the level of duty to be set ⁽⁷²⁾, the choice of the lower tax rate of 20 per cent of GGR for the online gambling was justified by reference to the following criteria:

(a) Gambling provided under Danish licences should be adapted to the current offering from online gambling providers abroad, i.e. the tax rate needs to be adjusted in order to match the high payout ratios offered by foreign online gambling providers, inducing them to actually apply for a licence.

(b) The total number of games offered should be increased, leading overall to an increase in turnover.

(c) The gambling products should be so attractive that players would not want to gamble on sites of foreign (illegal) operators.

(d) Blocking instruments should be used to ensure, in combination with items (a)-(c), that gambling on the sites of illegal operators is reduced to a minimum.

(132) In this memorandum, the Danish authorities note that the legislation in the UK, which should be regarded as being very close to the Danish gambling regulation, provides for a tax rate of 15 per cent for online gambling. The Danish authorities considered that the tax rate for online gambling could be set higher than in the UK since Denmark, in contrast to the UK, will also introduce complementary blocking measures to make it more difficult for players to gamble on sites of foreign operators that have not obtained a Danish licence.

(133) Similarly, the Danish authorities cite the examples of France and Italy, which have liberalised their markets and imposed higher rates of duty than the UK. The Danish authorities note that these markets are significantly bigger than the Danish market. The size of a

market can have a tangible impact on operators' willingness to enter a market even if there is a higher tax rate, as costs which are always associated with setting up operations in a new market tend to be comparatively higher for entry into smaller markets.

(134) The memorandum includes a simulation of the possible revenue effect of tax rates of 15, 20 and 25 per cent, also taking into account possible changes in gamblers' gambling patterns and operators' actions. The simulation exercise concludes that a tax rate of 20 per cent will presumably still make it sufficiently attractive for gambling providers to apply for a Danish licence and for gamblers to be offered attractive services. Setting a higher tax rate (i.e. 25 per cent) can be expected to increase pressure on payout ratios with the result that the positive revenue effect of a 25 per cent rate may turn out to be lower than with a 20 per cent rate.

(135) The Danish legislator therefore concluded that setting the tax rate for online gambling higher would most likely result in a gambling product that would not be attractive enough to gamblers, leading in turn to lower turnover, offsetting the immediate prospect of higher tax revenues.

(136) The conclusions reached by the Danish legislator as to the appropriate level of taxation for online gambling activities are also confirmed by a report from an industry consulting company, which found that a tax rate of 20 per cent would not mean that the State would forego revenue it would otherwise have received ⁽⁷³⁾. According to that report, this was the highest rate economically feasible — a higher rate would be a 'rate of no return', i.e. a tax rate that was simply too high for there to be a valid business case for operators to enter the market. Above this rate, the tax revenue would start to fall.

(137) In view of the foregoing, the Commission considers that the tax rate of 20 per cent of GGR applicable to online operators is not lower than is necessary to ensure that the objectives of the Gaming Act are achieved. Therefore, the aid measure meets the proportionality requirement set out in the case law of the Court of Justice.

7.2.3. Impact on competition and trade between Member States

(138) With regard to the impact of the aid measure on competition and trade, a distinction has to be made between possible distortions of the trade between Member States and distortions of competition within Denmark, especially with existing land-based gambling operators.

⁽⁷²⁾ See paragraph 38 above.

⁽⁷³⁾ H2 Gambling Capital, An independent model assessment of various taxation/licensing models for regulating remote gambling in the Netherlands, February 2011.

(139) With regard to trade between Member States, no negative impact is to be expected. The Gaming Act enables Danish residents to gamble legally on websites of licensed online gambling operators. Those websites are not restricted to Danish resident users but can be accessed by residents of all EU Member States, subject to the restrictions imposed by their national law. By setting the tax rate on online gambling operators at 20 per cent of GGR, the Danish aid measure is broadly in line with the rates of similar taxes applied by other Member States that have already reformed their online gambling legislation. For example, both Belgium and the UK apply a tax rate of 15 per cent of GGR to online gambling, whereas other Member States apply even lower rates (for example, Estonia 5 per cent of GGR, Latvia 10 per cent of GGR, Finland 8,25 per cent of GGR). Only Slovakia has set its a higher tax rate of 27 per cent of GGR.

(140) With regard to distortions of competition within Denmark, the measure will potentially benefit a considerable number of different Danish and foreign online gambling operators who up to now were prohibited from providing their services to Danish residents. Denmark submitted a list of online gambling providers who have already indicated their willingness to apply for a licence. As only the State-controlled company has hitherto been allowed to provide online gambling services, the liberalisation will increase overall competition in the market.

(141) Although the measure constitutes a State aid and its implementation may not be without repercussions for existing land-based gambling operators, who are taxed at a tax rate of up to 75 per cent of GGR, the Commission considers that the overall balance of implementing the measure is positive.

(142) As shown above, setting the tax rate for online gambling at the same or a similar level as the rate for land-based gambling operators would have led to a situation where the industry and players would not have responded to the possibility of legally providing online gambling services on the Danish market, thus defeating the identified objectives of common interest pursued by the Gaming Act.

(143) Accordingly, the Commission concludes that the measure is compatible with the internal market under Article 107(3)(c) TFEU.

8. CONCLUSION

(144) The Commission considers that the notified Act confers a tax advantage on online gambling operators that is granted through State resources. The measure is regarded *prima facie* as selective, since it differentiates between online gambling operators and land-based casino operators who, in the light of the objective pursued by the measure, are in a comparable factual and legal situation. The Danish authorities have failed to demonstrate that the *prima facie* selectivity of the notified act is justified by the logic of the tax system. Hence, the notified Act is regarded as State aid within the meaning of Article 107(1) TFEU.

(145) However, the Commission considers that the aid fulfils the conditions required for it to be regarded as compatible with the internal market under Article 107(3)(c) TFEU,

HAS ADOPTED THIS DECISION:

Article 1

The measure C 35/10 which Denmark is planning to implement in the form of duties for online gambling in the Danish Gaming Duties Act is compatible with the internal market within the meaning of Article 107(3)(c) of the Treaty on the Functioning of the European Union.

Implementation of the measure is accordingly authorised.

Article 2

This Decision is addressed to the Kingdom of Denmark.

Done at Brussels, 20 September 2011.

For the Commission
Joaquín ALMUNIA
Vice-President