

## Public consultation on the Green Paper on on-line gambling in the Internal Market

You are invited to reply to the on-line questionnaire. The questions listed in the Green Paper are reproduced in the same order hereunder. A pdf version of the [Green Paper](#) is available in all EU languages for guidance to the questions.

There are 51 questions in the consultation document. You may reply to those questions in any one of the EU languages. You may focus your contributions on the areas of most interest to you; you are not obliged to answer all the questions.

Please save this document on your computer. Once you have completed the questionnaire, come back to the on-line questionnaire. You will be able to upload your answers on page 3 of the on-line questionnaire.

The consultation will close on 31/07/2011.

We thank you for your participation.

### Your name / Your organisation:

Ministry of Finance, the Economy and Investment, MALTA

### Questions from the Green Paper on on-line Gambling in the Internal Market

1. Regulating on-line gambling in the EU: Recent developments and current challenges from the Internal Market standpoint
  - 1.1. Purpose of the consultation
  - 1.2. On-line gambling in the EU: current situation

**(1) Are you aware of any available data or studies on the EU on-line gambling market that would assist policy-making at EU and national level? If yes, do the data or study include licensed non-EU operators in the EU market?**

Malta refers to the studies mentioned in the Green Paper on on-line gambling in the Internal Market. In addition to these studies, individual Member States publish national data concerning their national market on on-line gambling. There are also various national studies such as that regarding the Swedish Market as well as Opinions issued by national competition authorities which include important data. With regard to more general data and studies, Malta would refer to the following studies:

- A study carried out by Sports business on the Contribution of the Gambling Industry to the Funding of Sports in UK and France, (8/11/2008) accessible at ([http://www.egba.eu/pdf/Final\\_study\\_Nov\\_2008.pdf](http://www.egba.eu/pdf/Final_study_Nov_2008.pdf) ).
- A 2010 study by Remote Gambling Association on sports betting: Legal, Commercial and Integrity issues; accessible at ([http://www.rga.eu.com/data/files/Pressrelease/sports\\_betting\\_web.pdf](http://www.rga.eu.com/data/files/Pressrelease/sports_betting_web.pdf).)
- 2010 ESSA integrity report accessible at (<http://www.eu-sa.org/LinkClick.aspx?fileticket=9%2BR9em4RhBY%3D&tabid=55&mid=372> ).

Malta would however also like to point out that the study referred to in the Staff Working document accompanying the Green Paper, and certain statistics quoted in the same working document and the Green Paper cannot be considered a reliable source of facts, at least with respect to figures quoted for Malta, which are incorrect. By way of example, the Green Paper quotes that in 2009, Malta had 500 licenses, when in fact Malta had 325 licences

**(2) Are you aware of any available data or studies relating to the nature and size of the black market for on-line gambling services? (Unlicensed operators)**

Malta welcomes the definition proposed by the Commission in relation to “illegal or black market” which is defined in the Green Paper as “markets on which unlicensed operators seek to provide on-line gambling services (pg 3) and as “unlicensed clandestine betting and gaming including from third countries” (pg 6). This is clearly distinguished from the “grey market” which is compared to the market for parallel importation.

With regard to the black market as defined above, Malta refers to the studies carried out on the German market (Gold Media Study “Betting & Gambling Market Germany 2015” and the 2010 BITKOM report) as well as those studies carried out on the French and Italian market (MAG 2011 study, “Jeux en ligne in the French market, Key features, strengths and weaknesses of the French legal gaming offer” ([http://www.mag-ca.it/Download\\_k.html](http://www.mag-ca.it/Download_k.html) ) and MAG 2010 study, “Overview of the Italian Regulatory Framework for Online Gaming, Evolution of the Italian Online Gaming Regulation 2002-2009” (<http://www.ft.dk/samling/20091/lovforslag/1202/bilag/4/825547.pdf>).

**(3) What, if any, is your experience of EU-based on-line gambling operators licensed in one or more Member State and providing and promoting their services in other EU Member States? What are your views on their impact on the corresponding markets and their consumers?**

Malta believes that there are two different aspects to this question and will, therefore, address these different aspects as follows. Firstly, Malta will refer to its experience in relation to Maltese licensed operators, which are EU-based on-line gaming operators, which provide and promote their services in other EU Member States. Secondly, Malta will explain its experience of operators which are licensed in other EU Member States and which provide their services in Malta.

Maltese licensed operators providing services from Malta.

Remote Gaming in Malta is regulated by the Remote Gaming Regulations (Subsidiary Legislation 438.04 hereinafter the “RGR”) which is the subsidiary legislation promulgated

under the main Act, the Lotteries and Other Games Act (Cap. 438, hereinafter the “LOGA”). In order to provide remote gaming services in or from Malta, one needs to obtain a licence covering the specific gaming operations. Licencees are to operate in compliance with the LOGA, with the RGR as well as the Anti-Money Laundering legislation (Cap. 373), Electronic Commerce legislation (Cap. 426), the Data Protection Act (Cap. 440) and any other relevant laws. According to Article 5 LOGA and Regulation 3 of the RGR, which was introduced in the law further to a specific request from the European Commission, an operator in possession of an equivalent authorisation issued by the government or competent authority of an EEA Member State, or any other jurisdiction approved by the Authority may offer remote gaming services in Malta. Regulation 3 further provides that the Authority may impose proportionate requirements and conditions in conformity with EU law as it may deem necessary in respect of games authorised by an EEA Member State. Suffice it is to note that in practice the Lotteries and Gaming Authority (LGA) has never considered it necessary to impose further conditions on operators duly licensed in the EEA providing cross border online gaming services into Malta. Therefore EEA based operators licensed in one or more Member States provide and promote their services in Malta, in full adherence to the EU treaties and the internal market principles.

Experience has shown that Malta’s internal market based approach to online gaming, implemented further to the European Commission’s instructions, is not reciprocated by other EEA Member States (with the exception of the UK and Gibraltar). On the contrary, other EEA Member States have adopted restrictive national gaming legislation.

In Malta’s experience, operators duly licensed in Malta and providing services in other Member States are faced with a situation which totally undermines their rights under EU law and internal market principles. Gaming is a service as defined under the EU Treaties, and as stated by the Court of Justice of the European Union (hereinafter “CJEU”) on numerous occasions, in the absence of a common regulatory framework in the gaming sector (harmonisation), the freedom of establishment and the freedom to provide services, enshrined in the EU Treaties, apply. To date restrictive national systems and practices across Member States are creating barriers to trade and the provision of services and are fragmenting and undermining the internal market. Thus, Maltese licensed gaming operators presently face difficulties in offering their services across the border in other Member States, and this in view of restrictive national gaming policies and in view of the development of national authorisation/licensing systems coupled with lack of enforcement of EU law.

Malta submits that national authorisations need to continue to be treated as the ‘exception’ to the EU’s fundamental freedoms and should not be projected as being the rule. A Member State which adopts a restrictive national policy needs to have valid justifiable reasons, as laid down in the EU Treaties or as accepted by the CJEU, and must satisfy the conditions laid down by the case law of the CJEU particularly as to the proportionality of the restrictive measures pursued. In addition the Member States would need to operate a “consistent and systematic gambling policy.”

Malta notes that despite the fact that both the Commission and Malta have submitted Detailed Opinions on Member States’ proposed legislation on numerous occasions, on the basis that such legislation was in breach of the internal market freedoms, certain Member States have proceeded to adopt restrictive regimes with what appears to be the tacit endorsement of the Commission. Malta invites the Commission to adopt a consistent and substantive approach with regards to all Member States.

The CJEU has done what it could in furtherance of internal market principles. However principles elaborated by this Court, for example the principle of non-duplication of

requirements and controls have been resisted by Member States and are not being implemented in practice. Malta believes that, in order to give full effect to the case law of the CJEU, Member States should acknowledge that where the Member State of establishment has in place a robust regulatory framework, as in the case of Malta, which pursues the same objectives as the receiving Member State and which offers a level of protection at least comparable to that effectively employed by the receiving State in its own territory, then the receiving Member State is not justified to restrict the provision of services of operators from the Member State of establishment and/or subject them to duplication of requirements and controls.

Indeed, Malta would cite one example, which demonstrates that the protection and controls carried out by the Maltese regulator ensure that the required consumer protection standards are enforced on all activities of its operators whether they operate in Malta or another Member State.

This case involved Maltese licensed operators promoting their services in another EU Member State. The Maltese regulator, the Lotteries and Gaming Authority (hereinafter referred to as “LGA” or “the Authority”), became aware that the promotional and advertising methods used by one of its operators in another EU Member State involved children (in particular they portrayed babies in gambling adverts) which violated the LGA’s Advertising Code. LGA immediately acted upon it and ended the irregular behaviour of its licensee. Suffice it to note that this was done on the initiative of the LGA and without any assistance from the other Member State concerned. Indeed the latter did not take any action to regulate this and was not involved in regulating the situation.

The current situation as described above has shown the uncertainty that exists. Countries like Malta were encouraged by the Commission to adopt a pro-internal market policy while other EU Member States have adopted restrictive national policies which the Commission has not really opposed. Consequently Malta, as well as EU citizens who want to receive these services, are uncertain about the Commission’s approach with respect to regulation of this market.

This uncertainty is equally present among operators who have invested substantially in setting up systems to provide services in accordance with Malta’s strict requirements and controls rather than seeking to establish themselves in jurisdictions outside the EEA. A non-EEA jurisdiction would have involved less costs, less regulatory and compliance burdens. Developments in the EU are creating instability in the market and if national restrictions are allowed to continue this will lead to the fragmentation of the internal market and as a result operators will simply relocate to non-EEA jurisdictions.

Governments and operators alike have faith in the EU’s internal market and if this is not functioning in on-line gaming, there will simply not be an EU market but rather a market made up of either unlicensed operators or operators licensed in non-EEA jurisdictions. This would be a travesty for consumers who, as will be shown below, find absolutely no protection or support from jurisdictions outside the EEA; it will also work against the protection of public order notably the prevention of money laundering and other crime.

Malta invites the Commission to address this problem without delay in the interest of EU citizens (players and consumers) and in the interest of public policy considerations common to all EU Member States. The elimination of the black market by creating a competitive well-regulated market in the EEA which ensures the functioning of the internal market and avoids duplication of controls is imperative as it would help prevent money laundering activities

whilst also assist in tackling fraud and poor gambling standards which this black market gives rise to in the first place.

#### Operators licensed by other EU-Member States providing services in Malta

According to Article 5 LOGA and Regulation 3 RGR, introduced in Maltese law further to a specific request from the European Commission, an operator in possession of an equivalent authorisation issued by the government or competent authority of an EEA Member State, or any other jurisdiction approved by LGA, may offer remote gaming services in Malta as explained in the reply to question 1 above. Malta's experience of EU-based on-line gambling operators licensed in one or more Member State and providing and promoting their services in Malta is generally positive although, from the experience of the LGA, a proper cooperative structure between national regulatory authorities would facilitate the effective regulation of this essentially cross-border activity across the EEA.

#### Impact on markets

Malta refers to the question concerning EU-based on-line gambling operators licensed in one or more Member States, which provide and promote their services in other EU Member States, and their impact on markets. Malta submits that there are many positive effects on the market of the Member State of destination, which are overlooked. By way of example, a Maltese licensed operator who provides services in another Member State generates various revenue streams in the latter. In particular, revenues are generated in other Member States through advertising activities, broadband usage, media costs, sponsorship agreements, payment services, financial institutions (banking) as well as employment. Indeed, in Malta almost 50% of the remote gaming employment is made up of nationals of other EEA Member States, thus further demonstrating that an open yet strictly regulated market creates job opportunities not only for Maltese nationals but for EEA citizens in general.

#### Impact on consumers

With regard to consumers, one of the underlying public interest objectives pursued by Malta's regulatory approach is the protection of consumers (players, minors and the vulnerable). In order to achieve this objective LGA carries out thorough pre-licensing and post-licensing controls on its applicants/licensees. In this regard, due diligence checks (going as far back as the ultimate beneficiary owner) are carried out to ensure applicants are "fit and proper" both at application stage as well as in cases of licence renewals. Business and technical ability are assessed and compliance systems are audited. The LGA has in place a number of player protection requirements, including a Code of Conduct on Advertising, Promotions and Inducements for the protection of minors and vulnerable persons, which are imposed on its licensees. Post-licensing controls are also carried out on licensees to ensure the protection of players. In this respect, various safeguards exist such as age limitations, self-limits on spending, self-barring, advertising limits, a helpline, protection of player funds and other requirements in players' interests.

One of the key elements of post-licensing is player support. In Malta, when a dispute arises, the player support channel ('PSC') acts as a mediator between the player and the licensee and ensures that players are aware of their rights and obligations. In 2009, PSC received 1,484 complaints, an increase of 70% compared to 2008. This increase is attributed to an increase in licensees but also in the organisation of internet fora which instigate consumers to make official complaints to the responsible regulator.

Once the LGA issues a licence, the LGA triggers its post-licensing monitoring mechanism and systems over the activities of such licensee by, amongst others, the application of a series of applications developed by LGA to actively monitor the gaming operations of its licensees known as the Remote Gaming Monitoring Systems (RGMS). Controls also ensure that operators are financially stable and solvent at all times. A whole array of measures is carried out to prevent, monitor and report money laundering or other criminal activities. Finally, the LGA is endowed with inspection and enforcement powers, which could lead to hefty administrative penalties as well as suspension or cancellation of a licence, or criminal prosecution.

In view of the experience Malta has gained in regulating this sector since 2004, Malta would like to emphasise that it is possible to adequately regulate the cross-border provision of on-line gaming services. Malta believes its model, which has been refined throughout the years, is the right model to ensure a competitive yet strictly regulated market. Indeed, the LGA ensures that Maltese operators that provide their services in other Member States protect player and consumer interests there, as it does in Malta. Malta is proactive and vigilant in ensuring that these requirements are abided by as mentioned in the example provided in point 1 above.

In practice the LGA has noticed a lack of proper player support and consumer complaint handling in other jurisdictions including EEA ones. As explained above, one of the key elements of post licensing controls is player support, a notion Malta has developed to the full. When the LGA receives a complaint from a player it either investigates the complaint itself or refers such complaint to the relevant licensee as stated in Regulation 56(3) RGR. In the latter scenario, the licensee shall within a period of twenty-one (21) days reply in writing stating the results of the inquiry into such complaint. The player is subsequently informed in writing of the outcome of any inquiry whereby reasons are given for the conclusions drawn in such notification. On the other hand, if it results that the company complained of by the player is not licensed by the Authority, the player is informed of this fact and is guided as to where the complaint may be addressed. This is where problems arise as the majority of jurisdictions do not have fully-fledged player support functions created specifically to deal with online gaming consumer issues, as in Malta. The lack of an independent regulatory authority may be one reason for this, as well as the fact that in some jurisdictions the national monopoly and the regulator are the same entity, giving no real redress to consumers. Typically, therefore, the LGA finds that consumers direct their queries to the LGA's PSC, irrespective of where the operator concerned is licensed, in the knowledge that they will receive reliable assistance.

Another impact on consumers is the negative impact on consumer choice and freedom created by the Member State restrictions imposed on EU-licensed operators which attempt to provide and promote their services in other EU Member States. In particular, a restriction of the fundamental freedoms exists insofar as EU citizens are prevented from accessing via Internet, services which are lawfully offered in other Member States. In the *Liga Portuguesa and Bwin International Ltd preliminary ruling (Case C-42/07. Liga Portuguesa de Futebol Profissional and BWIN International vs La Santa Casa della Misericordia*, judgment of 8 September 2009, ECR 2009 Page I-07633), the CJEU reaffirmed the principles laid down by its earlier case law regarding on-line gaming activities within the EU (notably in *Gambelli, Placanica, Schindler and Läära*). In particular, the CJEU recalled that legislation in a Member State which prohibits private operators established in other Member States, in which they lawfully provide similar services, from offering games of chance via the internet within the territory of that Member State constitutes a restriction to the freedom to provide services enshrined in Article 56 TFEU, by also imposing a restriction on the freedom of the residents of the Member State concerned to enjoy, via the internet, services which are offered in other Member States.

Apart from an obvious restriction to the freedom to receive services, Malta submits that such a restrictive policy has the effect of dictating to consumers what personal use they can make of their lawfully acquired internet access subscription from the privacy of their own homes and indeed when they travel to other EU Member States. By way of example if an Italian travels on holiday to France, it will be considered illegal for that citizen to access websites of Italian licensees for the simple reason that he has crossed the border. However, one can no longer talk of citizens as national citizens, but rather as citizens and consumers of an EU-wide internal market. Therefore, a citizen may work in Luxembourg, live in France (during the week) and travel to Germany over the weekend. The same citizen in his every day life will not have access to the same websites and will also have differing player protection rules with obvious internal market obstacles to the very consumer himself. Malta cannot support a policy, which decides for consumers which sites they can access. Malta believes instead that consumers should be empowered to make their own decisions by making them aware of their rights and obligations but ultimately leaving them responsible for their own choices. In particular Article 10 of the European Convention of Human Rights (hereinafter the “ECHR” as well as Article 11 of the EU Charter of Fundamental Rights of the EU guarantees not only the right to impart information but also the right to receive information. Indeed in a judgment of 10 March 2009 (Times Newspapers Ltd. (NOS .1 and 2) v The United Kingdom), the European Court of Human Rights made it clear that the Internet, given its important role in enhancing the public's access to news and facilitating the dissemination of information generally, falls within the protection afforded by Article 10 of the ECHR.

**(4) What, if any, is your experience of licensed non-EU on-line gambling operators providing and promoting their services in EU Member States? What are your views on their impact on the EU market and on consumers?**

Malta believes that it is important to make a clear distinction between (a) non-EU licensed on-line gambling operators, and (b) non-EU on-line operators that are completely unregulated and thus hold no licence from any non-EU jurisdiction. Malta makes this important distinction, as the experiences related to the two categories are not always the same.

**Non-EU Licensed On-line Gambling Operators**

In terms of Regulation 3 of the RGR, any EEA licensed operator may operate or promote or sell or abet remote gaming services in Malta. Furthermore, in terms of the same Regulation, the Maltese regulatory authority, LGA may approve of any other non-EEA jurisdiction, and thus allow operators licensed in such jurisdictions to offer remote gaming services in Malta.

Where non-EEA jurisdictions have in place regulatory frameworks which also establish a specific regulatory or authorisation body, this enables the LGA to establish formal or informal contact with the corresponding body with a view to address issues at hand. By way of example, offshore jurisdictions such as Alderney and Isle of Man have a regulatory structure and therefore this enables the LGA to have direct contact with the regulatory body. However, not all of the non-EEA jurisdictions, which grant a licence or permit, have a formal structure and/or a certain element of controls that facilitate interaction or which provide some minimal levels of regulation and control. Certain jurisdictions in South America and the Caribbean States for instance pose particular problems in so far as simply being ‘licence certificate issuers’, rather than promoting a regulated environment.

**Non-EU unlicensed On-line Gambling Operators**

On-line gambling operators, which do not hold any form of authorisation from any jurisdiction, are without any doubt the most problematic on a number of counts. Firstly, such

operators are not subject to any form of due diligence checks or fit-and-proper screening checks in order to ascertain that such operators are truly free from crime, fraud and money laundering. Secondly, such operators are not subject to recognised independent audits to ascertain that their games or odds are truly integral and fair. Thirdly, such operators are not subject to strict controls in order to ensure that the consumers' identities are protected, that payment mechanisms are secure, and that a winning consumer would have his/her winnings actually paid. Such sites disregard important responsible gaming measures such as reality checks, age verification, and so forth. It should also be noted, that such sites, which predominantly originate from Asia also allow players to play on credit. The latter is considered under Maltese Gaming Laws as illegal (as such a facility does not fall under the Maltese principles of responsible gaming), and is not allowed by all EU Member States. Such 'black market' operators pose important difficulties to the Maltese Authorities, as their traceability is difficult, and so is enforcement.

A worrying development that has occurred recently relates to 'scam' sites, which present themselves as regulated operations, quoting licence numbers and registered addresses that do not belong to them. The LGA for instance identified one such site in 2010, which was immediately reported to Interpol through the Police, and consumers were publicly notified of the scam site.

It is to be highlighted that in 2010, 15.5% of the enquiries or complaints received by LGA, through its dedicated function of 'Player Support' referred to sites and operators not regulated by the Authority and which were not licensed in the EEA. The predominance of referrals to the Authority related to consumers complaining about unclear terms and conditions, late or non-payments to players, and the lack of clarity as to where the operator was effectively regulated. Thus, the statistics provided by the LGA indicate that the main issues regarded: lack of information which gave rise to a lack of clarity on the applicable legislation as well as consumer protection and rights (if at all), and lack of information of redress mechanisms. The LGA also experienced that consumers, including non Maltese residents, which would not have managed to obtain a reply to their queries or complaints from the non-EEA jurisdiction often sought 'refuge' with the LGA with the hope that the Authority had a contact with a corresponding body outside of the EEA and would address their queries and complaints.

Such examples further confirm the importance of at least establishing EU wide harmonisation of minimum standards on consumer protection in the gambling sector, whereby such standards are not only imposed on EEA licensees, but are also widely brought to the attention of EEA consumers. In this respect, Malta highlights that its RGR provide a robust framework of consumer protection mechanisms. Furthermore, the LGA was the first regulatory body within the EU Member States to issue a Charter on Players' Rights and Obligations as part of its awareness campaign to the public (<http://www.lga.org.mt/lga/content.aspx?id=85923> LGA Players' Rights and Obligations Charter).

**(5) If any, which are the legal and/or practical problems that arise, in your view, from the jurisprudence of national courts and the CJEU in the field of online gambling? In particular, are there problems of legal certainty on your national and/or the EU market for such services?**

Malta would take this opportunity to dispel the misconception put forward by certain Member States, as a way of justifying their national restrictions, that non-duplication is tantamount to mutual recognition. The two concepts and principles are different. Malta urges the Commission to give this principle its due recognition in order to ensure its application as a principle established by the CJEU. Accordingly, as mentioned above, non-duplication entails a positive duty on the part of Member States to take full account of the requirements already



fulfilled and controls conducted in other Member States, insofar as they safeguard the same objectives, and not duplicate them. In practice what this means is that: when an operator already licensed in the EEA applies for a licence from another Member State, such other Member State should, before imposing controls and requirements already imposed and approved in another Member State, assess the similarity between the legislation of the two Member States concerned with regard to the conditions under which the licences at issue are granted. If a Member State requires a person to obtain a new licence, without due account being taken of the fact that the conditions of issue are, essentially, the same or similar as those applying to the licence already issued to him in another Member State, then this constitutes a disproportionate restriction even if pursuing legitimate objectives.

Legal uncertainty is also fuelled by:

- (i) the divergent interpretations given to the case law of the CJEU, which is very often purposely misquoted or selectively interpreted;
- (ii) the resistance to recognise and apply, amongst others, the principle of non-duplication of controls as elaborated by the CJEU.

Malta acknowledges that the CJEU has oscillated between approaches over the years, however Malta believes a clear line can and should be objectively identified. Malta would highlight the following salient aspects of the case law as follows:

- Games of chance are to date not harmonised. It follows that, as stated by the CJEU, in the absence of Union-wide uniform rules in the sector, Member States retain a ‘margin of discretion’ to regulate these services. Thus, primarily the CJEU acknowledges the possibility for the EU legislator to provide for such uniform rules through harmonisation to rectify any problems which cannot be rectified by Member States alone at national level. In the absence of this however, the ‘margin of discretion’ enjoyed by Member States to restrict the provision of games of chance across EU borders is subject to clearly defined limits.
- According to the CJEU’s established case law, this discretion subsists only insofar as considerable ‘moral, religious or cultural differences’ in fact underlie the individual Member States’ policies in this field. Such restrictions cannot, however, be justified by an alleged need to protect consumer interests or to prevent crime or fraud, where it is shown that the Member State of establishment of a particular service provider has in place a robust regulatory framework which pursues the same objectives as the receiving Member States.
- Established case-law such as *Webb* (C-279/80) and *Canal Satélite* (C-390/99), confirmed by none other than the Grand Chamber of the CJEU as recently as 25 January 2011 in the *Michael Neukirchinger* preliminary ruling (C-382/08), has consistently affirmed a positive duty on the part of Member States to take full account of the requirements already fulfilled in the Member State of Establishment, insofar as they safeguard the same objectives pursued by the receiving State. Thus Member States may not duplicate controls which have already been carried out, or impose additional conditions on operators established in other Member States other than those imposed on their own nationals. Malta regrets the absence in the Green Paper of any reference to this important caselaw, which the Commission itself regularly cites in its Detailed Opinions on notified national laws in this sector.

Malta would take this opportunity to dispel the misconception put forward by certain Member States, as a way of justifying their national restrictions, that non-duplication is tantamount to mutual recognition. The two concepts and principles are different. Malta urges the Commission to give this principle its due recognition in order to ensure its application as a

principle established by the CJEU. Accordingly, as mentioned above, non- duplication entails a positive duty on the part of Member States to take full account of the requirements already fulfilled and controls conducted in other Member States, insofar as they safeguard the same objectives, and not duplicate them. In practice what this means is that: when an operator already licensed in the EEA applies for a licence from another Member State, such other Member State should, before imposing controls and requirements already imposed and approved in another Member State, assess the similarity between the legislation of the two Member States concerned with regard to the conditions under which the licences at issue are granted. If a Member State requires a person to obtain a new licence, without due account being taken of the fact that the conditions of issue are, essentially, the same or similar as those applying to the licence already issued to him in another Member State, then this constitutes a disproportionate restriction even if pursuing legitimate objectives.

By way of practical examples Malta submits that where the fairness of a game is certified by an independent certification body which carries out an evaluation as to the actual randomness of the Random Number Generator (RNG) of a game, why should an operator with the same RNG, approved in one jurisdiction, have to repeat the certification and testing procedures in another EEA Member State? Also where a Member State carries out a very thorough test of “fit and properness”, as for instance such as those carried out in Malta where the checks continue to escalate up to the ultimate beneficiary owner, once approved, why should similar controls be duplicated on the same person by other EEA jurisdictions? For example, if an operator listed on an EU stock exchange applies for a gaming licence and is subject to an assessment of fit and properness by the listing authority and is duly certified by that listing authority, then such certificate should be accepted in other jurisdictions and controls not duplicated for the purposes of fit and properness.

- Judgments such as the preliminary ruling in *Ladbrokes Betting & Gaming Ltd and Ladbrokes International Ltd v Stichting de Nationale Sporttotalisator (Netherlands)* (C-258/08) held that in the field of games of chance, Member States are required to take into account the requirements already fulfilled by the provider for the pursuit of such services in the home State.

Furthermore, in *Stoss* (joined cases C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07) and *Carmen Media* (C-46/08), the Court positively affirmed that any gaming authorisation system operated by a Member State “should satisfy the requirements following from the case-law, particularly as to its... proportionality”.

- The *Liga Portuguesa* (C-42/07) judgment which is so often purposely mis-interpreted, must only be understood as confirming that it is the ‘mere fact’ that a company is licensed in another Member State, that cannot in itself be considered a sufficient guarantee. The words “mere fact” here cannot be ignored. The Court in *Liga Portuguesa* did NOT affirm categorically that in the sector of games of chance the Member State of establishment can never sufficiently guarantee the professional quality and integrity of its operators. Therefore, while Member States might enjoy a ‘margin of discretion’ to regulate the provision of games of chance in their territories, this discretion can only be applied to the extent that there are substantive differences between the controls effectively exercised by the receiving Member State and that of establishment.

- Moreover, where it is evident that a particular Member State’s policy is not genuinely aimed at safeguarding some overriding public interest objective as recognised by the CJEU – but aims rather to protect its national gaming monopoly in order to ensure maximum returns to the State – it cannot restrict the free movement of such services on ‘moral, religious or cultural’ grounds.

- As re-affirmed most recently in *Stoss*, national gaming monopolies are ONLY permissible in terms of EU law where all of the stringent, cumulative conditions laid down in that judgement are fulfilled. The *Läärä* (C-124/97) and *Liga Portuguesa* judgments, on the other hand, are purely context-specific, as confirmed by this Court itself and at any rate, such judgments do NOT support a categorical assertion that any gaming monopoly is permissible in terms of EU law.

In *Stoss* the Court affirmed that the establishment of a measure as restrictive as a monopoly may be justified only in order to ensure a particularly high level of consumer protection by virtue of a legislative framework which is suitable for ensuring that the holder of the monopoly will in fact be able to pursue such an objective, in a consistent and systematic manner, by means of a supply that is quantitatively measured and qualitatively planned; and is furthermore subject to strict control by the public authorities.

- The principle of mutual trust, as well as the duty of loyalty and sincere cooperation enshrined in Article 4 TEU, requires and obliges Member States to take full account of their fellow Member States' legal regimes; and to seek to resolve any differences by collaborating in putting into effect the aims of the Union.

- The *Zeturf* judgment (C-212/08) issued on 30 June 2011 reaffirmed the duty of Member States restricting gaming services to supply evidence that their restrictive national measure is justifiable and proportionate. Thus such Member States must put forward genuine reasons for their restrictions and in addition, they are obliged to back up their justification by providing concrete evidence – including that there actually exists a black market that requires regulating. Furthermore, this ruling confirms that the internet is merely a channel for distribution. In fact, the Court here held that the consistency test must be applied on all segments of betting – irrespective of the channel of distribution. Any particular risks associated with online gaming claimed by Member States to require stricter and more restrictive regulation need to be substantiated by empirical evidence.

- Finally the judgment in the *Dickinger and Omer* preliminary ruling (C-347/09), expected as soon as September of this year, is also awaited. This case in particular has raised issues of non-duplication and mutual trust in the context of the free movement of gambling services. Specific questions have been put to the Court and clarity is being sought on the extent of application of these principles.

**(6) Do you consider that existing national and EU secondary law applicable to on-line gambling services adequately regulates those services? In particular, do you consider that coherence / consistency is ensured between, on one hand, the public policy objectives pursued by Member States in this field and, on the other hand, the national measures in force and/or the actual behaviour of public or private operators providing on-line gambling services?**

With regard to its national regulatory framework, Malta considers that its existing national law and regulations regulating online gaming services, are in full adherence with its obligations under EU law which it willingly agreed to take on upon its accession in 2004 not least because it saw the benefits of a well functioning internal market which the relevant EU institutions were seen to strive to uphold.

Indeed since the creation of the regulatory authority, the LGA, in 2001, the LGA has steadily built a reputation as a strict yet ideal gaming jurisdiction with a highly regulated gaming business. Over the past years, the remote gaming sector in Malta has experienced dynamic and fast growth. The LGA's ethos of being a serious regulator coupled with its excellent track

record has translated in increased consumer trust both in Maltese players and players from overseas who play with remote gaming companies licensed by the LGA. Malta's regulatory regime aims to be, and is, both technology neutral and game neutral – encompassing any type of gaming using a means of distance communication (including internet, digital TV, mobile phone technology, telephone and fax). Any remote game of chance (or chance with skill) which can be securely managed under LGA regulations will be considered for licensing and regulation.

Malta considers that its existing national law and regulations regulate online gaming services, coherently and consistently addresses the public interest objectives it pursues. The underlying objectives of Malta's regulatory approach are threefold namely:

1. That gaming is fair and transparent to the players;
2. The prevention of crime, corruption and money laundering; and
3. The protection of minors and vulnerable players.

In order to achieve the fulfilment of these objectives LGA carries out thorough pre- licensing and post- licensing controls. In this regard, due diligence checks (going as far back as the ultimate beneficiary owner) are carried out to ensure applicants are “fit and proper” both at application stage as well as in cases of licence renewals. Business and technical ability are assessed and compliance systems are audited. The LGA has in place a number of player protection requirements, including a Code of Conduct on Advertising, Promotions and Inducements for the protection of minors and vulnerable persons, which are imposed on its licensees. Post-licensing controls are also carried out to ensure the protection of players. In this respect various safeguards exist such as age limitations, self-limits on spending, self-barring, advertising limits, helpline, protection of player funds and other requirements in players' interests. One of the key elements of post- licensing is player support. In Malta, when a dispute arises, the player support channel ('PSC') acts as a mediator between player and licensee and ensures players are aware of their rights and obligations.

Once a licence is issued the LGA triggers its post-licensing monitoring mechanism and systems over the activities of such licensee by, amongst others, the application of a series of applications developed by LGA to actively monitor the gaming operations of its licensees known as the Remote Gaming Monitoring Systems (RGMS). Controls also ensure that operators are financially stable and solvent at all times. A whole array of measures is carried out to prevent, monitor and report money laundering or other criminal activities.

Finally the LGA is endowed with inspection and enforcement powers which could lead to hefty administrative penalties as well as suspension or cancellation of a licence, or criminal prosecution.

The LGA is also designated as a “supervisory authority” on the prevention of money laundering under the Prevention of Money Laundering Act thus creating responsibility for ensuring preventive measures are in place across its licensees in this respect.

In particular, with respect to money laundering and other crime in Malta, the following measures are in place to avoid, monitor and control money laundering or other criminal activities.

1. In the pre-licensing compliance checks, LGA requests true copies of the agreements between the operator and the payment gateway in order for LGA to ascertain that the payment gateways are licensed by a Financial Services Authority within the European Economic Area.
2. The ongoing monitoring of the compliance sections in LGA check that the operator only accepts transactions from licensed financial entities.
3. Licensed financial entities carry out their own additional and separate checks on players, their accounts, identification verification etc and monitor transactions separately from the LGA. Financial services are also subject to Anti Money Laundering obligations.
4. According to Maltese legislation, funds remitted by the internet gambling operator to the player must be remitted to the same account from which the funds were paid into the player's account originated. So players can not use different internet / bank accounts on the same remote gambling platform or send funds directly to other players' accounts. Indeed, Regulation 37 (2) of the RGR (LN 176/04,) stipulates that the funds may only be remitted by the licensee to the player, to the same account from which the funds paid into the player's account originated.
5. Regulation 40(1) of the RGR states that a licensee shall keep players' funds separately from the licensee's own funds in a Clients' account held with a credit institution approved by the Authority. Furthermore, if LGA detects that a licensee did not comply with Regulation 37(2) the licence may be revoked. This mitigates the risks that are related to the usage of third parties.
6. Specific legal requirements are in place to mitigate Money Laundering / Financing of Terrorism risks related to internet gambling and measures and tools are implemented by the competent authorities in order to supervise the activities of those operators and to monitor the financial transactions related to this type of activity. According to Regulations.8 and 9 of the RGR, LGA shall not issue or renew a licence unless it is reasonably satisfied that all persons involved in the applicant company are fit and proper persons and that the licensee has followed policies and will take affirmative steps to prevent money laundering and other suspicious transactions. The compliance stage checks that the licensee is indeed compliant. This is crosschecked by an independent professional auditor. Furthermore, given that a licensee must keep players' funds separately from the licensee's own funds in a Clients' account held with a credit institution approved by the Authority, such funds are movements are monitored by the holding bank and, therefore, may be subject to a STR.
7. Each operator must conduct a risk assessment to ensure their business follows the principles of Customer, Product, Financial, Geographical and Activity risks. These risks should be monitored and reviewed on a regular basis in order that risk mitigation requirements can be added, altered or deleted accordingly to the risk model. Some operators use a scorecard approach others use a traffic light system.

In view of the experience Malta has gained in regulating this sector since 2004, Malta would like to demonstrate that it is possible to adequately regulate the cross-border provision of on-line gaming services. Malta believes its model, which has been refined throughout the years, is the right model to ensure a competitive yet strictly regulated market. Of particular importance is Regulation 3 of Malta's RGR which allows operators in possession of an authorisation issued by the government or competent authority of an EEA Member State to provide services in Malta.

Malta does not consider, however, that other existing national regulations and EU secondary law applicable to online gambling services adequately regulate these services. In view of this, Malta would like to put forward its regulatory model as a possible template for future regulation across the EEA.

Malta is concerned at the current state of fragmentation of the European online market. Malta believes that a system of 27 different National Authorisation regimes without any due consideration of the principle of non-duplication of controls, without any EEA wide minimum consumer protection standards and coupled with a pick and choose approach of regulator-to-regulator cooperation, continue to fuel further fragmentation. Malta, having the largest jurisdiction in terms of regulating remote gaming operators, believes that fragmentation and the concept of a National Authorisation (which in theory creates specific market boundaries) has the effect of hindering the cross-border provision of on-line gaming services by duly authorised operators across Member States.

Malta believes that national requirements imposed by Member States on duly licensed EEA operators to establish themselves in that Member State and obtain additional licences therein to provide the same services for which they hold a licence from another EEA Member State, constitute a restriction to Articles 49 and 56 TFEU and with the case law of the CJEU.

Moreover, Malta shares the concern which seems to have been raised by MEP Creutzmann in point 12 of his draft report submitted to the IMCO Committee, European Parliament, on the Green Paper on On-line Gambling that the size of a national market may be too small to attract operators to obtain a national authorisation, even if such a national authorization framework may be present. In this respect Malta submits that since a national authorisation regime limited to a small market will not be effective and attractive enough for operators to obtain such an authorisation, this would place member states with a small market in a difficult situation whereby they would have no effective means to channel consumers wanting to entertain themselves with authorized online gambling operators. This will lead to a clear risk that the black market, which will not be subject to any regulatory costs and requirements, will thrive in such member states.

Malta, having built an intimate knowledge of the dynamics of this sector estimates that a market of less than 10 million inhabitants will not be attractive enough to attract operators to obtain a national license. The European Union established the internal market, for the very purpose, to have a functioning market even in smaller Member States. Malta continues to advise an open-market approach. Indeed, whilst Maltese operators, may in terms of Maltese legislation, provide their services cross-border, Maltese legislation, (and also on the insistence of the European Commission) allows operators licensed in the EEA to provide services in Malta. In Malta this open-market approach has led to a well-regulated yet competitive European market, where the geographical and national market size of the Member State concerned (Malta) has not been a detrimental factor for attracting operators. As a result, consumers are channelled to legally authorised operators.

With respect to the question on consistency Malta notes that the coherence and consistency between, on one hand, the public policy objectives pursued by Member States in this field and, on the other hand, their national restrictive measures in force as well as the actual behaviour of public or private operators providing on-line gambling services leaves much to be desired. Member States have proposed or introduced legislation on online gaming, which at face value does not even appear to pursue any overriding objective in the public interest recognised by the CJEU. Many of the proposed legislative measures do not contain any proper justification and even less so, any evidence to justify their claimed objective. It is pertinent to note this opinion was also subscribed to by the European Commission itself in a

number of Detailed Opinions that the Commission raised against proposed gaming laws as notified through Directive 98/34/EC.

In particular, it must be recalled that in *Stoss*, the Court affirmed that the establishment of a measure as restrictive as a monopoly can be justified only in order to ensure a particularly high level of consumer protection. Therefore, it is not sufficient that a Member State should vaguely invoke the broad objective of, for example, consumer protection, as recognised in this Court's established jurisprudence; it must furthermore be able to show that their restrictive measure was established to ensure a 'particularly high' level of consumer protection – and this, to cite *Stoss*, by virtue of a legislative framework which is suitable for ensuring that the holder of the monopoly will in fact be able to pursue such an objective, in a consistent and systematic manner, by means of a supply that is quantitatively measured and qualitatively planned; and is furthermore subject to strict control by the public authorities.

By way of example, the *Dickinger v Omer* preliminary ruling (Case C-347/09 - Reference for a preliminary ruling from the Bezirksgericht Linz (Austria) lodged on 31 August 2009 — Criminal proceedings against Jochen Dickinger, Franz Ömer, OJ C 282 , 21/11/2009 P. 0026 - 0027), which judgment is expected later this year, is noteworthy as in this case the CJEU seeks to establish precisely whether this consistency exists. Indeed Malta contends that the national restrictions at issue in these proceedings were not based on any evidence that proves that they were necessary to achieve the fulfilment of a valid objective. For example, one of the restrictive provisions at issue in the national Austrian legislation took the form of a so-called "limit" of €300 per player per week - or €3,200 per month. However, this limit is not statutorily imposed at all but is actually self-imposed by the operator itself. With a minimum wage, which is far below this amount, one doubts whether such a limit could be genuinely considered to be in the interest of consumers at all – let alone that it ensures a 'particularly high' level of consumer protection. Other examples of inconsistency include the monopoly operating within a rudimentary and very loose legal framework, which does not fulfil the 'watertight' requirements of suitability and consistency laid down in *Stoss*. Indeed, the relevant legislation does not regulate the actual offer of games or the licensee's promotional activities; but mainly imposes structural and financial conditions, which aim to ensure the highest tax returns for the State. Malta therefore doubts whether this can be considered a comprehensive legislative framework ensuring a "particularly high" level of consumer protection in a consistent and systematic manner, as required by *Stoss*. Indeed licensees are free to determine their own business AND promotional activities. Furthermore paragraph 15a of the Austrian Law on Gaming (*Glücksspielgesetz*) provides "Any expansion of the business activities of the Licensee requires the consent of the [relevant] Federal Minister of Finance. This consent shall be given if no reduction in the Licence Fee or betting tax is to be expected". However the CJEU, as recently as the *Zeturf* ruling (C-212/08) issued on 30 June 2011, has reaffirmed that, "... it is settled case-law that economic grounds are not included in the grounds listed in Articles 45 EC and 46 EC and do not constitute an overriding reason in the public interest capable of justifying a restriction on the freedom of establishment or the freedom to provide services."

Furthermore, in many cases national monopolies conduct aggressive advertising in a manner which – as opposed to being 'strictly limited to what is necessary in order to channel consumers towards authorised gaming networks' - is aimed at stimulating participation in gambling by the population at large, by portraying it as an attractive and harmless way to earn easy money. Examples in the above-mentioned Austria case included eye-catching bill-boards and advertisements bearing the words "dirt cheap to participate in the Poker European Championship"; "Magic Money": win up to €20,000' and "Believe in luck!" These examples squarely fit the Court's description of unacceptable advertising practises in *Stoss* – notably insofar as they 'trivialise gambling' and 'depict major winnings in glowing colours'.

Malta submits that it is effectively impossible to ensure the requisite ‘high’ level of consumer protection in a consistent and systematic manner, insofar as the licensee is free to determine its own business and promotional activities. The relevant provisions of certain national laws on gaming aim, rather, at ensuring maximum revenues to the State by either strengthening their national monopolies’ positions or seeking to prevent any possible reduction in the payable Licence Fee or betting tax.

The CJEU has consistently insisted on proving the existence of a genuine concern to bring about a genuine diminution of gambling opportunities and to limit activities in that sector in a consistent and systematic manner (Zenatti, paragraphs 35 and 36; Gambelli paragraphs 62 and 67; Placanica para. 53). Another example can be seen in the Placanica case where the Court observed that the Italian system at issue in those proceedings could not be justified by the objective of reducing gambling opportunities, inasmuch as it evidently did not reflect a concern to bring about a genuine diminution of gambling opportunities. Indeed, this same Court has acknowledged that the Italian legislature was pursuing a policy of expanding activity in the betting and gaming sector, with the aim of increasing tax revenue. Therefore, a restrictive national policy must be accompanied by measures aimed at genuinely reducing gaming opportunities for national consumers, or at otherwise limiting the propensity of consumers to gamble (Placanica, para. 54) or at channelling gaming activities into controllable systems to prevent their use for criminal or fraudulent purposes.

Most recently in Zeturf, the CJEU went even further stating the following at paragraph 70:

“...it is for the national court to determine, in particular, whether, first, criminal and fraudulent activities linked to gambling and, second, gambling addiction might have been a problem in France at the material time and whether the expansion of authorised and regulated activities would have been capable of solving such a problem (Ladbrokes Betting & Gaming and Ladbrokes International, paragraph 29). In particular, the Court has stated that if a Member State wishes to rely on an objective capable of justifying an obstacle to the freedom to provide services arising from a national restrictive measure, it is under a duty to supply the court called upon to rule on that question with all the evidence of such a kind as to enable the latter to be satisfied that the said measure does indeed fulfil the requirements arising from the principle of proportionality (Stoß and Others, paragraph 71). In that regard the Commission argues that the national authorities have not, in contrast to the situation in Placanica and Others and Liga Portuguesa de Futebol Profissional and Bwin, demonstrated the reality of a black market for betting on horseracing.”

In the conclusions the CJEU held that, “in order to be consistent with the objectives of combating criminality and reducing gambling opportunities, national legislation establishing a gambling monopoly must be based on a finding that criminal and fraudulent activities linked to gaming and gambling addiction are a problem in the territory of the Member State concerned, which the expansion of authorised and regulated activities would be capable of solving.”

Hence the further insistence that to prove consistency there must be real criminality that the monopoly seeks to address and curb, on proof of evidence.

In conclusion, Malta believes that it must be recalled in this regard that the case-law in this field has been consistently predicated on the presumed existence of ‘moral, religious or cultural differences’ between the Member States. It is strictly on the basis of these assumed divergences between the core values and objectives underlying national gaming regimes, that Member States are held to enjoy ‘a margin of discretion’ in this field. Malta doubts that in reality, there are such divergences between Member States and furthermore doubts that the



requirement of consistency mentioned in this question is ensured in Member States' restrictive national measures. Indeed Malta believes the genuine underlying objective to most national policies on gaming is fiscal in nature and this is disguised under the umbrella of one of the public interest objectives. In this respect, Malta calls upon the Commission to conduct a comparative analysis between Member States to determine the actual existence or otherwise of differences between Member States' stated objectives in regulating online gaming and if these exist, to determine the extent of the actual divergences.

## **Other comments on issues raised in section 1**

2. Key policy issues subject to the present consultation

2.1. Definition and organisation of on-line gambling services

### **(7) How does the definition of on-line gambling services in the Green Paper differ from definitions at national level?**

Malta refers to the broad definition of 'On-line gambling services', provided by the Commission in its Green Paper as its preliminary view on a possible future definition, and this subject to the outcome of this consultation:

On-line gambling services are any service which involves wagering a stake with monetary value in games of chance, including lotteries and betting transactions that are provided at a distance, by electronic means and at the individual request of a recipient of services.

Malta highlights that its legislation, namely the LOGA and the RGR provide for a set of definitions that include similar elements and terms. Under the Maltese Regulations, however, the term 'Remote Gaming' is used instead of 'On-line Gambling'. The use of the term 'Remote Gaming' instead of 'On-line gaming' is intended to cover a wider spectrum of games and delivery methods that can be conducted via all means of distance communications, including delivery channels such as the internet, mobile and IPTV. The following terms are defined as follows in the Lotteries and Other Games Act and the Remote Gaming Regulations:

"remote gaming" means any form of gaming by means of distance communications;

"means of distance communication" includes any means which may be used for the communication, transmission, conveyance and receipt of information (including information in the form of data, text, images, sound or speech) or for the conclusion of a contract between two or more persons; without the simultaneous physical presence of those persons; such means may be unaddressed or addressed printed matter, a standard letter, telephone with human intervention or without human intervention (such as automatic calling machine, audiotext), radio, videophone (telephone with screen), videotext (microcomputer and television screen) with keyboard or touch screen, electronic mail, facsimile machine (fax), and television (teleshopping), and any other means of communication, transmission, conveyance and receipt of information by wire, radio, optical means, electromagnetic means or by any electronic means;

"electronic means" means all electronic data transfer, whether by telephony, facsimile, computer or any other means of distance communications as approved by the Authority

"remote gaming licence" means the licence granted to a licensee by the Authority to conduct remote gaming;

"remote gaming related activities" means any activity or business that the Authority considers reasonably related to the operation of remote gaming, or any business that offers goods or services to persons who participate in licensed remote gaming;

"game of chance" means a game for money and, or prizes with a monetary value, the results of which are totally accidental;

"game of chance and skill" means a game for money and, or prizes with a monetary value, the results of which are not totally accidental but depend, to a certain extent, on the skill of the participant;

"bet" means a game in which the player is required to forecast any result or outcome in respect of one event or a set of events; and "betting" shall be construed as the playing of a bet;

"stake" means the economic value which the player of a game, or any third party on his behalf, has to commit in order for the player to participate in such game and which he can lose, wholly or in part, following the result of the game;

Given the above definitions provided for in the Maltese RGR, Malta is of the opinion that the proposed definition in the Green Paper is acceptable in principle.

However, Malta does not consider the sub-definition quoted in the Green Paper on page 14, footnote 51, to be acceptable. Such a footnote which seeks to further define the main definition, in particular the terms "...at the individual request of a recipient of services" is seeking to exclude "distance transactions [taking] place through a network of natural persons acting as intermediaries using electronic means". Such natural persons are described as follows: "such as shop staff working at a point of sale". While Malta acknowledges that a public physical interface may require a national or regional authorisation or permit to conduct face to face gaming transactions, Malta believes that the supply of the online game itself which is already licensed in the EEA should not be excluded from the definition of an 'online gambling service'. Indeed, while further requirements may be required for the public physical interface, the online game service itself should not be excluded from the definition of online gambling, on the contrary it should continue to be governed, regulated and controlled separately from the public physical interface as an online gambling service. By way of example, in Malta, the gaming halls that offer games of chance that involve the physical presence of the player and an intermediary fall under a separate regulatory regime, namely the Gaming Devices Regulations. Under such Regulations, a number of conditions and controls are imposed on the 'public physical interface' however, if the game on offer is offered through distance communications, and the game is already approved in the EEA as an 'online gambling licensed game', then the part of the activity which is online is considered as an 'Online game' and is regulated as such accordingly.

**(8) Are gambling services offered by the media considered as games of chance at national level? Is there a distinction drawn between promotional games and gambling?**

Maltese legislation defines a game of chance as a game for money and, or prizes with a monetary value, the results of which are totally accidental. The Maltese legislation also defines games of chance and skill, which are defined as games for money and, or prizes with a monetary value, the results of which are not totally accidental but depend, to a certain extent, on an element of skill of the participant. Games of chance and games of chance and skill cannot be played or operated in Malta unless they are licensed by the Lotteries and Gaming Authority or an equivalent authority within the EEA or within any other approved jurisdiction.

Promotional and non-profit games of chance are therefore all regarded as games of chance in terms of Maltese legislation. However, different categories of games of chance are regulated under different provisions and in some cases, specific regulations.

Promotional media games are defined in Maltese legislation as follows;

"commercial communication game" means a game which is organised with the purpose to promote or encourage the sale of goods or services, and which does not constitute an economic activity in its own right, and where any payments required to be made by the participant serve only to acquire the promoted goods or services and not to participate in the game, although it may be a condition that a person purchases the promoted goods or services in order to participate in the game; and "commercial communication game licence" means a licence to operate a commercial communication game granted by the Authority to a person under article 40, and "commercial communication game licensee" shall be construed accordingly;"

On the other hand, games offered as an economic activity per se by means of distance communications are regulated under a separate set of Regulations (Remote Gaming Regulations S.L. 438.04) and means of distance communications are defined as follows;

"means of distance communication" includes any means which may be used for the communication, transmission, conveyance and receipt of information (including information in the form of data, text, images, sound or speech) or for the conclusion of a contract between two or more persons; without the simultaneous physical presence of those persons; ..."

**(9) Are cross-border on-line gambling services offered in licensed premises dedicated to gambling (e.g. casinos, gambling halls or a bookmaker's shop) at national level?**

Yes. Due to technology convergence it has become very common for traditional land-based operations to be offered by means of distance communications from another jurisdiction. Server based gaming is just one example.

Once the game is licensed from another EEA or approved jurisdiction the LGA automatically recognizes such licence. However, the public physical interface of such operations is still regulated by the Authority and requires the necessary permits and approval from the Authority and other competent authorities.

**(10) What are the main advantages/difficulties associated with the coexistence in the EU of differing national systems of, and practices for, the licensing of on-line gambling services?**

The main difficulties associated with the co-existence of differing national systems of, and practices for, the licensing of on-line gaming include the following:

- The regulation of gambling services at a purely national level, whilst ignoring the internal market aspect of this services, would tantamount to the de facto negation of the application of the EU Treaties, in particular, the free movement principles and disregard of the CJEU case law. Furthermore, given the current regulatory framework, in particular Member States' requirement of a national authorisation with regards operators already licensed within the EEA, this will lead to 27 internal markets in the gambling sector. This will result in a huge array of very costly duplication of requirements and controls for operators already duly licensed in an EEA Member State irrespective of the degree of scrutiny already subjected to by the original licensing Member State;
- Fuelling the growth of the "black market" as the regulated market within the EEA, which would be made up of 27 differing licensing systems, becomes economically unsustainable for licensed operators;
- Less consumer protection due to the availability of black market (i.e. operators providing services without any authorisation and subject to no control) as well as differing consumer protection regimes for those consumers who avail of the internal market and work, reside and travel in different member states;
- Increased money laundering and other crime as the black market operates under the radar of authorities;
- Resultant loss of revenues for all the EEA Member States;
- Implementation of invasive enforcement measures (such as IP and payment blocking) against duly licensed EEA operators providing services in fulfilment of EU law and against the freedoms of EU citizens including their freedom to receive services and fundamental human rights including the right to receive and impart information.

The first difficulty highlighted above concerns the negation of EU law and internal market principles. Malta has consistently held that gaming is a service as defined under the EU Treaties, and that in the absence of a common regulatory framework in the gaming sector (harmonisation), the freedom of establishment and the freedom to provide services, enshrined in the EU Treaties, apply. Indeed Malta's licensed operators seek to provide cross-border online gaming services in full adherence to the principles of the EU Treaties as interpreted by the CJEU, however, given the restrictive national systems and practices across Member States, the gaming sector is characterised by fragmentation and undermining of the internal market. Thus, Maltese licensed gaming operators presently face difficulties in offering their services across the border in other Member States, and this in view of restrictive national gaming policies and in view of the development of national authorisation/licensing systems.

These differing national systems should not be allowed to co-exist and instead the free movement principles need to be upheld. National authorisations need to continue to be treated as the 'exception' to the freedoms of movement and should not be projected as being the rule. A Member State which adopts a restrictive national policy needs to have valid justifiable reasons, as laid down in the EU Treaties or accepted as a justifiable ground by the CJEU, and must satisfy the conditions laid down by the case law of the CJEU particularly as to the proportionality of the restrictive measures pursued. In addition the Member States would need to operate a "consistent and systematic gambling policy".

In addition, Malta would like to point out that updates of Member States regulatory regimes increasingly show a trend towards the total discounting of requirements and controls, licensing systems and regulatory regimes already imposed on duly licensed operators by the

EU Member States of Establishment. Even where a national authorisation system validly derogates from the freedom to provide services (because that Member State has valid justifiable reasons and fulfils the proportionality principle in compliance with the rulings of the CJEU) the CJEU has held that that Member State must apply the principle of non-duplication of requirements and controls. This is a principle which Malta has advocated at an EU level and also before the CJEU (Dickinger and Omer preliminary ruling) because it is a principle which the Court has consistently upheld in cases like Webb and Canal Satélite and which the Grand Chamber of the CJEU has very recently re-confirmed (25 January 2011) in the Michael Neukirchinger preliminary ruling. Furthermore it is a principle which the Commission itself consistently develops in its reactions to draft laws notified by Member States through the notification system established by Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services (“TRIS” notification procedure).

The de facto disregard of this important internal market case law results in a huge array of very costly duplication of requirements and controls for operators already duly licensed in an EEA Member State irrespective of the degree of scrutiny already subjected to by the original licensing Member State.

Indeed, Malta considers that should national authorisations become the accepted rule at a European level, this would result in unsustainable burdens for private gaming operators. Firstly, these operators are already facing substantial unfair competition from unlicensed operators/black market that are very active in the EEA and are not respecting any EU/EEA regulation with consequent concerns for the maintenance of consumer protection and public order. Secondly, due to the high costs operators may not be in a position to set-up in 27 Member States, and may as a result choose to set up only in the larger markets, thereby leaving the smaller markets open to the “black market”

Furthermore, the co-existence of 27 differing systems would result in restrictions of the freedoms which European Citizens, such as players or consumers, are entitled to enjoy (see point 4(b) of the above reply to question 3) as well as a rampant black market with reduced consumer protection and risks of money laundering and other crimes.

In view of the above, the EU is faced with a situation which (1) undermines the EU Treaties, in particular the Treaty freedoms and the internal market principles, (2) disregards case law of the CJEU, (3) disregards the Commission's opinions and concerns raised through the TRIS procedure and (4) creates concerns from the citizens’ perspective in that enforcement measures are impinging on their fundamental right to receive information. In turn, a market characterised by ambiguity and legal uncertainty has emerged which causes unnecessary burdens on duly licensed EEA operators and in favour of illegal operators holding no licence at all or one from an unknown jurisdiction outside the EEA. This black market which, according to the Green Paper, makes up 85% of the EU market operates to the detriment of consumer protection and the preservation of public order objectives such as the prevention of money laundering and other crime and is in direct illegitimate and unfair competition with the duly licensed EEA operators. A thriving black market means loss of a regulated market in the EU with resultant loss of revenues for Member States, less wealth and less job creation.

Finally the use of invasive enforcement measures (such as IP and payment blocking) to enforce national policies whose compatibility with EU law is not confirmed, is a disproportionate measure when applied against EEA duly licensed operators who operate on the basis of the principles of free movement laid down in the EU Treaties. Such blocking measures are being used to apply a restrictive policy (which imposes the requirement to obtain a national licence to provide online gaming services without considering whether an

equivalent permit issued by an EEA Member State is already held for the same services) that is in itself disproportionate and incompatible with EU law and the rulings of the CJEU. As stated by the CJEU in *Ladbrokes* (C-258/08) “since the implementing measure laid down by national legislation does not, in itself impose additional restrictions on the market, consideration of its conformity with European Union law is closely linked to the national Court’s examination of the compatibility of the Wok with Article 49 EC” (para. 45). Furthermore, the use of such measures raise concerns for EU citizens’ rights namely their right to receive services (Article 56 TFEU) and their fundamental human rights including the right to receive and impart information (Article 11 EU Charter Fundamental Rights).

### **Other comments on issues raised in section 2.1**

The Green Paper attempts to give an interpretation of the various regulatory models in place within the EEA. In its attempt to try to define the heterogeneous models in place across the EEA, the Green Paper classifies the market under three main categories:

- The “illegal or black market” which is defined in the Green Paper as “markets on which unlicensed operators seek to provide on-line gambling services (pg 3) and as “unlicensed clandestine betting and gaming including from third countries” (pg 6). Therefore operators classified as forming part of the black market are those operators who do not hold any authorisation from any EEA State;
- The ‘so called’ Grey Market, which the Green Paper describes as being markets consisting of operators duly licensed in one or more member EEA states providing online gambling services in other member states without obtaining authorisation to do so under the corresponding national legislation;
- The third category, which is not defined in the Green Paper, which is defined by exclusion, is the market, which is neither black nor ‘so called’ grey.

Whereas the classification of the black market is clear, the Green Paper does not enter into the detailed merits of what the licit market is, other than alluding to a ‘so called’ grey online market. Such a lack of clarity, in Malta’s view, continues to fuel, at least during this Green Paper process, more legal uncertainty. Such legal uncertainty is further compounded by the fact that the ‘so called’ Grey Market was endorsed and promoted by the same European Commission. Given that this definition is also a clear reference to Malta’s regulatory framework, Malta would like to bring to the fore that in 2007, the European Commission had requested Malta to broaden its remote gaming regulations to encompass the acceptance of licensed operators from the European Economic Area offering their services in Malta, in full respect of the internal market principles, whereby as a consequence Malta immediately amended its remote gaming regulations in this regard. Thus Malta maintains, that as the European Commission, as recently as 2007, mandated Malta to be even more broad in its legislation in order to allow the internal market to function effectively, Malta’s regulatory model cannot be defined to fall under the ‘so called’ Grey Market. Such a definition of ‘so called’ Grey Market also captures other states within the EEA such as the UK, Gibraltar and France, whereby although the latter adopts the requirement of the need to obtain a National Authorisation in order to target the French market, nonetheless allows French licensed operators, specifically authorised by the French regulator ‘ARJEL’, to freely accept non-French citizens and thus operate anywhere in the EEA with the French license (Source: [http://www.arjel.fr/IMG/pdf/FAQ\\_PRO\\_20100512.pdf](http://www.arjel.fr/IMG/pdf/FAQ_PRO_20100512.pdf) (Frequently Asked Questions page 4 of 95) Question: Des joueurs « non français » peuvent-ils s’inscrire sur le site de l’opérateur et jouer contre les joueurs français. Si oui, doit-on tracer l’ensemble des événements liés à ces joueurs dans le coffre-fort ? ARJEL:Toute personne est autorisée à jouer sur un site

accessible depuis le territoire français, à la condition que celui-ci soit exploité par un opérateur agréé par l'ARJEL et ce, peu important l'Etat dont elle est ressortissante ou celui où elle a fixé sa résidence. Toute offre de jeux ou de paris en ligne d'un opérateur agréé doit être proposée conformément à toutes les exigences du droit français, exigences que l'opérateur s'oblige à respecter lors du dépôt de son dossier de demande d'agrément).

In this regard, Malta does not agree with the classification of the 'so called Grey Market', more so as to date, the European Commission has not determined in an unequivocal way which model is truly acceptable in terms of the functioning of the EU Treaty and Internal Market rules. Indeed Malta can not accept that this term be used as a direct reference to Maltese licensed operators who offer their services cross-border in other Member States. Infact Malta interprets this term, as defined in footnote 3 of the Green paper, as not intending to put into question the legality of Maltese operators who are licensed in Malta and also offer their services in other Member States. Malta submits that this is the only possible interpretation to be given in the light of the 2007 Commission's strict request for Malta to effect changes to its Gaming legislation in order to widen its scope to accept gaming licenses issued in the EEA in order to be fully compliant with the Internal Market rules – a request which Malta fulfilled without hesitation. Malta cannot suddenly accept that doubt be cast on the legality of its duly licensed operators.

Malta, therefore, considers that it is not the regulatory regime of the Member State/s, such as Malta, in which the operators offering their services to citizens in other Member State/s, are licensed, that should be put into question. On the contrary, it is the impediments and restrictions on the Maltese licensed operators placed by the Member State/s in which such operators are offering their services, that is creating uncertainty and "greyness", that needed to be put into question. It is these restrictions which are causing the "challenges" referred to in the last paragraph of page 3 of the Green Paper and indeed, the Member State placing restrictions on EU licensed operators may not even operate a "consistent and systematic gambling policy", as the Court of Justice requires.

In view of this, Malta considers that the follow-up to the Green Paper needs to address these restrictions placed by Member States on duly licensed operators which are not allowed to operate cross-border and provide their services in other Member States, because such Member States have restrictive regimes. Indeed some of the Member States in which Maltese operators have difficulty in providing their services in are Member States which have restrictions in their regimes which the Commission itself issued comments or detailed opinion when the Member States notified their legislation through the notification procedure instituted by Directive 98/34/EC (known as "TRIS" notification system) e.g Belgium. Other Member States such as Germany, have has been declared by the Court of Justice as not operating a "consistent and systematic gambling policy" (Case C-409/06 Winner Wetten GmbH v Bürgermeisterin der Stadt Bergheim; Joined Cases C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07 Markus Stoss and Others v Wetteraukreis Kulpa Automaten-service Asperg GmbH and Others v Land Baden-Württemberg; and in Case C-46/08 Carmen Media Group Ltd v Land Schleswig-Holstein and Others), as the Court of Justice requires.

Malta however notes that the definition provided for in the Green Paper as to what would constitute the 'so called Grey Market' includes a specific parallelism to the notion of 'parallel importation of goods' (Source: Green Paper on 'Online Gambling in the Internal Market' page 3, footnote 3: 'The notion of "grey" is often used to describe a factual or legal situation in the context of EU law (regarding for instance, i.e., the parallel importation of goods)'). Malta opines that one must, therefore, make a full and detailed analogy with this reference to the market of parallel importation of goods as an identified criterion for defining the 'Grey' market in the field of online gambling. Malta submits in this respect that parallel importation

of goods is de facto a legal offering, whereby the receiving member state cannot declare such an importation as an illegal activity in their territory, and thus the internal market rules apply. Thus, by analogy, if Member State A has a system of 'National Authorisations', it cannot declare the parallel import to be illegal.

## 2.2. Related services performed and/or used by on-line gambling services providers

**(11) With focus on the categories mentioned in the Green Paper, how are commercial communications for (on-line) gambling services regulated for at national level? Are there specific problems with such cross-border commercial communications?**

Regulation 60 of the RGR (SL438.04) sets out limitations on advertising, which are required to be adhered to by all remote gaming licensees. It states that advertising should not-

- imply that remote gaming promotes or is required for social acceptance, personal or financial success or the resolution of any economic, social or personal problems;
- contain endorsements by well-known personalities that suggest remote gaming contributed to their success;
- contain endorsements by well-known personalities that suggest remote gaming contributed to their success;
- exceed the limits of decency.

In addition, the LGA has issued a Code of Conduct on Advertising, Promotions and Inducements which is applicable to all its licensed gaming operators, therefore both land based or remote. This imposes further restrictions particularly relating to: linking advertisements with smoking or alcohol abuse, suggesting that skill could influence the outcome of games purely based on chance, suggesting that gaming is a form of financial investment, depicting underage players and encouraging the contravention of any gaming law. The Code also covers the conduct of promotions, whereby it prohibits player reward schemes to be linked to playing with a minimum period of time or money to qualify.

The Broadcasting Authority in Malta has also issued regulations for broadcasting service providers to follow directions in relation to gambling advertisements and their airing thereof. Under the Requirements as to Advertisements, Methods of Advertising and Directions Applicable to Gambling Advertisements (SL. 350.25), the main objective of these Directions is to ensure that gambling advertisements in the local broadcasting media are socially responsible, with particular regard to the need to protect children, young persons and other vulnerable persons from being harmed or exploited by advertising that features or promotes gambling. The Directions also seek to promote appropriate ethical standards in the content of this category of advertising. It sets out time limits as well as limits on advertising similar to the limits set by the Lotteries and Gaming Authority.

Problems with such cross-border communications could ensue due to the fact that the legislative requirements imposed in one Member State may not be the same in other Member States and hence enforcing such limits could be problematic. However, while Malta acknowledges that regulators could face problems in dealing with cross-border commercial communications, this is mainly due to the lack of proper structures for regulatory cooperation



across the EEA. Notwithstanding, Malta submits that when a regulator is serious about dealing with an issue then difficulties may be overcome. In this respect Malta cites the LGA's Code of Conduct on Advertising, Promotions and Inducements. Indeed as detailed in point 1 of the reply to question 3 above, the LGA actively applies its rules and regulations on commercial communications of its operators even in a cross-border context. Indeed, in the case cited above, the LGA identified the irregularity carried out on the territory of another EU Member State with respect to advertising and took action against its operators independently despite the absence of cooperation.

**(12) Are there specific national regulations pertaining to payment systems for on-line gambling services? How do you assess them?**

Online payment service providers are regulated by the Malta Financial Services Authority (MFSA). However, it should be noted that Malta's gaming regulator, the LGA, does not duplicate controls and requirements pertaining to payment or financial services institutions which are already licensed by the MFSA or another EEA financial services regulatory authority. It is inconceivable as to how payment services which are specifically regulated through harmonised EU legislation are regulated differently at a national level within a gaming law which de facto is not the law regulating financial services at a national level.

The LGA vets the agreements entered into between its licensees and all credit institutions, including payment service providers. All agreements between the financial institution or payment service providers require the approval of the Authority according to pre-defined conditions. Regulations 40 and 43 of the RGR set out the rules pertaining to on-line payments to players. Amongst such rules it is stipulated that the LGA is required to approve (by way of ascertaining that the holding of a valid EEA license or authorisation) of the Credit Institution holding player accounts and furthermore requires a declaration from such an institution attesting compliance with specific conditions stipulated in Regulation 40 in relation to player accounts held on behalf of the licensee. The Authority would require that the Credit Institution is licensed by the Financial Services Authority or its equivalent in any of the EEA Member States.

**(13) Are players' accounts a necessary requirement for enforcement and player protection reasons?**

Any on-line gambling operator that does not have clearly controlled players' accounts would not qualify for a Malta licence and would not retain a Malta Licence. Player's accounts are imperative for player protection purposes, for the prevention of money laundering, for operators' accountability purposes, for forensic investigative purposes and for enforcement purposes. Malta, which is the veteran in the EU in regulating online gambling, established the importance of players' accounts from the inception of its RGR. What distinguishes a thoroughly regulated online gambling operation from a traditional lottery operation is the very fact that each gaming transaction is attributed to an identifiable person, as opposed to the notion of an 'anonymous ticket holder'. The latter is a key aspect especially in the context of preventing money laundering.

The LOGA 2001, together with the underlying RGR make specific requirements regarding player protection mechanisms even through the requirement of players' accounts. Such players' accounts are also cross-linked to the legal requirement on licensed operators to have players' ring fenced account with a financial institution within the EEA (Regulation 40), whereby the funds held within such a ring fenced account cannot be utilised by the operator other than for player payment purposes. Under the LOGA, should an operator use such funds

for operational purposes, such use of funds are considered to be tantamount to misappropriation of funds thus subject to criminal prosecution Moreover, the LGA ensures that all its licensees implement very stringent functionality within their systems and control processes for player protection purposes and report periodically to the authority the operator's player liabilities, which need to reconcile with the funds held in the ring fenced players' bank account.

**(14) What are the existing national rules and practices relating to customer verification, their application to on-line gambling services and their consistency with data protection rules? How do you assess them? Are there specific problems associated with customer verification in a cross-border context?**

Malta submits that "Know your customer" (KYC) procedures by the operators are of paramount importance for the on-line gambling sector and for cross-border transactions in view of the lack of face-to-face interaction. Maltese licensees are obliged to abide by the RGR as well as as the provisions in the Data Protection Act (Cap. 440) in carrying out such "Know your customer" procedures.

The Authority requires all its Remote Gaming Licensees to conduct KYC on all its customers to prevent fraud and money laundering as well as prevent underage gambling. Regulation 32 of the RGR in fact provides for the obligation of registration of players with on-line operators and lists a minimum set of requirements that should be requested from a player by an on-line operator. Furthermore, this same Regulation prohibits a player from having multiple player accounts in order to detect suspect accounts and fraud. Operators must carry out checks including the obtaining of copies of identity cards, utility bills and other official documents, as well as searches through public databases and telephone and email verification.

In order to ensure that customers are made aware by the on-line operator of what kind of information would be requested from them for registration, Regulation 49 paragraph (f) RGR stipulates that amongst other information to be provided to the public, the licensee should necessarily provide information on the procedures to be adopted for the registration of players.

Malta considers that it is important to have customer verification during various stages including at the pay-out stage. To this end, Regulation 36 of the RGR also stipulates that a licensee cannot effect a payment in favour of a player in excess of two thousand, three hundred and twenty nine euro and thirty seven cents out of his/her player account without first verifying the player's identity, age and place of residence and furthermore such funds shall only be remitted to the same account from where such funds originated from. Furthermore, Regulation 37 stipulates that a license holder may, before remitting funds which are standing to the credit of the account of a player, take such time as is reasonably necessary to verify the player's registration as a player, verify the playing of a game by such player and conduct security and other internal procedures in relation to the player's account.

The LGA encourages its licensees to perform as many checks as possible in compliance with the Regulations and with Data Protection and Privacy laws so as to ensure that players are in fact who they claim to be upon registration, as well as at pay-out stage. Hence requests for an electronic copy of passports and credit cards are in fact procedures sanctioned by the Authority as part of the licensee's due diligence checks. Furthermore all Maltese licensees are subjected to regular and random audit checks by the Authority personnel, which also cover data security.

The Green Paper mentions that customer identification may raise specific internal market problems when the service provider and customer are at different locations. Malta submits that while this may be true, there are ways of rectifying such problems. In this respect pin based transactions such as pay-pal should have a system whereby every so often the client is asked to identify his/her pin number and if they fail to do so, then you have a clear suspicion of fraud on which to act. This helps ensure identification safeguards. Furthermore new systems are available, which could be applied uniformly, whereby KYC is sent even via phones in that a photo of the customer's ID card must be taken instantaneously and sent to the company. This means that you do not need to wait until payout so you get more information on the players upon registration. Another way of effectively ensuring security is a system of card swipe, chip and pin (challenge and response password). By way of example Malta refers to 3Dsecure which is a scheme developed by the card schemes in order to enhance security.

In view of the above Malta submits that the problems mentioned in this section can be tackled by imposing, at EU level, the required higher security features for payment systems, which in any case already exist on the market. In view of this Malta submits it is not logical to portray the problem as one being related to on-line gaming operators or cross-border operators.

### Other comments on issues raised in section 2.2

#### 2.3. Public interest objectives

##### 2.3.1. Consumer protection

**(15) Do you have evidence that the factors listed in the Green Paper are linked to and/or central for the development of problem gambling or excessive use of on-line gambling services? (if possible, please rank them)**

Malta submits that there is no empirical evidence that the factors mentioned above are linked to problem gambling. Such generalisation is not possible because risk factors vary depending on the characteristics of the player and his/her particular vulnerabilities for instance the dream effect created by lotteries might be a higher risk for a certain type of personality, while player involvement factor might be more risky for a competitive personality. Thus the ranking of factors in order of risk is not realistic or reflective of what actually happens.

Furthermore, recent studies show that neither the type of game nor the location has an effect on the risk of developing problem gambling (LaBrie, R.A. & Shaffer HJ (2011), Identifying behavioural markers of disorder Internet sports gambling, Addiction Research & Theory.)

**(16) Do you have evidence that the instruments listed in the Green Paper are central and/or efficient to prevent or limit problem gambling relating to on-line gambling services? (if possible, please rank them)**

Since 2004, Maltese regulation comprises all of the instruments referred to in this question, including age limitations, self-limits on spending, self-barring, advertising limits, helpline, warning displays and other requirements in players' interests, and can confirm their efficacy to varying degrees of success, for example based on clinical experience, self-exclusion is indeed effective. Furthermore, according to available national statistics, less than 0.1% of the

population per year have sought help for gambling problems in the last 5 years, with 99% of them being land-based related.

**(17) Do you have evidence (e.g. studies, statistical data) on the scale of problem gambling at national or EU level?**

According to statistics made available by the various gambling support organisations in Malta, less than 0.1% of the population per year have sought help for online gambling problems in the last 5 years, with 99% of them being land-based related.

**(18) Are there recognised studies or evidence demonstrating that on-line gambling is likely to be more or less harmful than other forms of gambling for individuals susceptible to develop a pathological gaming pattern?**

Malta is not aware of any such studies, indeed as stated in the Green Paper, it is difficult to draw direct links between remote gaming and the likelihood of becoming addicted. Furthermore on-line gaming operators have more sophisticated possibilities to track transactions of each player compared to offline and allows for real time behavioural studies.

The British Gambling Prevalence Survey 2010 carried out by the National Centre for Social Research, found addiction rates for online gambling even lower than those for certain forms of offline games.

**(19) Is there evidence to suggest which forms of on-line gambling (types of games) are most problematic in this respect?**

Malta is not aware of any such empirical evidence. Indeed, there is a general lack of uniform statistics across all EU Member States concerning problem gambling. According to Dr Mark Griffiths, (Problem gambling in Europe: an Overview, April 2009 Report for Nottingham Trent University UK), there appear to be some consistent trends across those EU Member States who have carried out research. In his opinion, problem gamblers are most likely to be electronic gaming machines (EGM) players, with slot machines being the most problematic.

**(20) What is done at national level to prevent problem gambling? (E.g. to ensure early detection)?**

At a national level, prevention of problem gambling is organised on a multi-tier level so as to have the widest reach possible so as to prevent consumers that engage in gaming for entertainment purposes from the possibility of ending up with a gambling problem.

The multi-tier level mentioned above is based on the following tiers:

- I. the Policy Tier
- II. the Regulatory Tier
- III. the Outreach Tier
- IV. the Proximity Tier
- V. the Support Tier

## Policy Tier

The prevention of problem gambling at a national level is firstly primed from Malta's policy on gaming, whereby the legislative ethos is based on the principle of 'responsible gaming'. Malta's gaming laws are based on the cardinal principles that authorised games are fair and integral, and that the vulnerable should be protected. The legislative framework is based on this gaming policy, whereby various measures are included in the legislative framework to ensure that gaming is kept as a form of entertainment. Furthermore, all the necessary preventive measures are in place so as to prevent gaming from becoming a problem for individuals who are vulnerable and who intrinsically have a lack self control and are psychologically predisposed to addiction in general.

From a legislative point of view, the legislator placed various measures as mandatory measures for licensed operators to abide by. Such measures include, but are not limited to the requirement for an online gaming operator to provide the consumer with a system of 'reality checks' that ensure that the consumer does not lose the notion of time and affordability. Moreover, operators are also required to provide the consumer with 'self limits' functionality, whereby a consumer can 'a priori' determine the maximum deposit for a determined period of time and determine a maximum limit on the time spent playing. Moreover, the law does not allow for any play based on credit, so as to avoid having consumers borrowing money to play, where experiences from the land based black market has taught us that playing on credit is a sign of problem gambling which could also lead to serious issues of usury. Through such a provision in the law, this risk is eliminated.

Moreover, Malta adopted an open market model in the case of gaming as opposed to a total prohibition or market restrictive model, as Malta believes that the most effective way of ensuring that the market is not underground or unregulated, is to have an open market, which is strictly and effectively regulated. This policy was adopted to meet public interest objectives including consumer protection, as the prevalence of an underground market does not allow to have effective national preventive measures, but would only allow for reactive and/or curative measures, as underground markets thrive on the exploitation of the vulnerable.

## Regulatory Tier

A key stakeholder acting as the 'guardian of the national policy' insofar as player protection is concerned and thus for the prevention of problem gambling is Malta's independent regulatory body: the LGA. Malta established a focused and independent regulatory body to ensure that the legislative framework on gaming is enforced at all levels. The LOGA 2001 endows the Authority with specific roles and responsibilities in order to ensure that the market is strictly and effectively monitored and controlled. One such important role and responsibility of the Authority, is for it to ensure that operators applying and/or holding an online gaming license have all the preventive measures implemented. Operators are firstly audited to ensure that preventive measures such as reality checks are indeed in place and working, whilst regular operator checks include post-licensing audits to ensure that such preventive measures are available anytime.

The Authority also provides an open channel to consumers, through its dedicated 'player support unit', whereby consumers can raise queries and complaints, whereby the Authority's staff are trained to identify whether certain queries or complaints raised are in fact an

indication that a consumer may be facing a particular predisposition to problem gambling, and thus guide the consumer to seek specialised help.

Moreover, the Authority also has the role to monitor operators' advertising media campaigns to ensure that online operators comply with the Advertising Code, whereby such a code was designed so as to ensure that operators do not give the 'impression' to consumers that gaming will improve their life.

### Outreach Tier

Awareness and education is a key factor in the prevention of problem gambling. A wide array of initiatives are conducted by various stakeholders in order to reach to the general public and gaming consumers, insofar as bringing people aware of pitfalls that a person in a moment of vulnerability should be aware of. The LGA places public information in the form of 'self tests', brochures, adverts, whilst its officials are regularly on the audio/visual media so as to explain the importance of determining self limits, explaining how they could limit game play, etc. The Authority is also in the process of finalising a cooperation project with a charity organisation which works for the prevention and treatment of problem gambling in order to extend the 'player self-exclusion process' to the online environment. The aim of this project is to facilitate the process of player self-exclusion and the process for operators to ascertain whether a consumer is self-excluded.

A key 'outreach' stakeholder at a national level is the National Agency which deals with the problem of addiction 'SEDQA'. This Agency was set up in June 1994, and it offers health promotion, prevention, treatment, and rehabilitation services to persons with drug, alcohol, and/or gambling problems, and to their families. This Agency conducts awareness and educational campaigns at a national and sectoral level for preventive purposes, whilst it also informs the public where help and support can be sought for.

A similar role is conducted by the Non-Governmental Organisation 'Caritas Malta'.

### Proximity Tier

In order to avoid a predisposition to problem gambling, from effectively turning into problem gambling, it is of utmost importance to provide various measures or alerts during game play. In a land-based gaming operation, physical proximity to preventive or control measures have proved to be very effective. A player who is vulnerable at a point in time may find the strength to control himself/herself there and then by signing into the 'player self-exclusion' register that is available in each licensed gaming premise. Such an experience was transposed into the online gaming scenario, where for preventive purposes it is important that the online consumer has access to certain measures in real time and not subject to the consumer needing to fill in off-line forms that could take days until such requests are received and processed. Thus, the importance of having for instance 'self limits' functionality in real time. The Maltese regulations and license conditions impose the 'proximity' criterion by having all preventive measures offered to consumers by licensed operators in real time.

### Support Tier

Support to consumers of both online and terrestrial gaming services, is provided at a national level by 'Sedqa', the Maltese National Agency against all forms of abuse, including drugs, alcohol and gambling abuse. 'Sedqa' provides both remote and personal support to its clients, through its officials which are thoroughly trained in dealing with addiction and also with problem gambling. Sedqa also offers its support through a national free phone helpline. There is a support-line which is a 24-hour free telephone service run by a team of professionally trained volunteers. It provides immediate, confidential support to callers.

The LGA has also established a strong relationship with GamCare (<http://www.gamcare.org.uk/>) an organisation which offers online, phone and counselling support programmes in this field of problem gambling.

**(21) Is treatment for gambling addiction available at national level? If so, to what extent do on-line gambling operators contribute to the funding of such preventive actions and treatment?**

Yes, treatment for gambling addiction, whether online or offline is available at national level including counselling services and other personal assistance individuals may require. There are addiction and abuse prevention programmes, including in schools, as well educational awareness campaigns carried out locally. Furthermore, the Non Governmental Organisation 'Caritas Malta' has specific support groups set up for gamblers (such as the group Gamblers Anonymous (GA)) as well for family members (GamAnon).

In Malta, taxes raised from online gaming are channelled to Government's Consolidated Fund, which fund also provides funding to SEDQA, the National Agency for Support and treatment of addiction cases such as drug abuse, alcohol abuse and problem gambling. Furthermore, LGA is in the process of establishing a Responsible Gaming Trust (the Play Responsibly Trust), which will contribute to financing of preventive actions, measures and treatment for problem gambling, whilst promoting responsible gaming. Online gaming operators have signalled their intention to place contributions for these purposes with the Responsible Gaming Trust.

**(22) What is the required level of due diligence in national regulation in this field? (e.g. recording on-line players' behaviour to determine a probable pathological gambler?).**

National legislation through the RGR is primarily preventative in nature. It, therefore, aims to protect players by ensuring that the necessary warning signs and ad hoc mechanisms are in place by Maltese licensees in order to prevent a player, or minimise the possibility of a player, from becoming a problem gambler.

To this end, Regulation 42 of the RGR imposes a condition on its licensee to display at all times, and in a prominent place on the home page website, a warning of the addiction possibilities of gaming and information and links to other websites assisting compulsive gamblers, for players to seek help if and when needed.

A number of measures are also foreseen by the legislator in order to ensure that players can set limits on their gaming a priori. To this end Regulation 43 of the RGR provide players with the possibility to set limits on the amounts they wager, on their losses, on the time of game play per session, and to self-exclude themselves for a definite or indefinite period of time.

The RGR also seek to ensure prevention and control in real time. Therefore, Regulation 44 also caters for the requirement to have counters displayed in the screen where game play is

occurring. Hence, the licensee must ensure that the on-line counter is displayed to the player at all times, and that it automatically updates itself and shows the correct account balance to the player. This Regulation also imposes the obligation on licensees to run an automatic reality check at hourly intervals in order to suspend play, to display the time of game play as well as losses and winnings. A read receipt message by the player is required, and the player is also given the option to suspend the session or to return to the game.

**(23) What is the statutory age limit for having access to on-line gambling services in your Member State? Are existing limits adequate to protect minors?**

Under Maltese law the statutory age limit to access on-line gambling services is set at eighteen (18) years of age. We believe that this age limit is adequate to protect minors considering also the fact that under Maltese law a person may begin to trade at sixteen (16) years of age and vote at eighteen (18) years of age and hence is considered to have the required level of maturity.

**(24) Are on-line age controls imposed and how do these compare to off-line 'face-to-face' identification?**

On-line age controls are imposed when opening a player account, as well as when a player requests payment of winnings as explained in question 14. Furthermore as explained under Question 14 Operators are also obliged to conduct Know Your Client (KYC) checks. Such checks include the provision of copies of identity cards, utility bills and other official documents, as well as searches through public databases and telephone and email verification.

In face-to-face identification, the norm applied throughout the EEA, is that only one legal identification document is usually required and therefore the risk of forgery may be present.

In addition, the Green Paper mentions gambling services offered over mobile telephony or IPTV as a possible source of concern. In particular it states that stakes will increasingly be paid using a mobile phone (added to the invoice) e.g. by text message or call to premium rate phone numbers and in these cases it may be easier for minors to be able to gamble.

Malta rebuts this statement in that if, with respect to gambling over mobile phones, the payment for stakes will be added to the invoice – then the same KYC applies and the telecommunication have knowledge of the customers who they have a contract with and whom they invoice. Thus, the safeguards of KYC and others apply here.

With respect to gambling on mobile phones where stakes are paid by calling or texting to a premium number, Malta submits that gambling services are not allowed on voice premium rate numbers. Whilst the SMS premium rate services are currently not regulated in Malta, so far, the National Regulatory Authority is not aware of any requests made to the telecommunications operators for such gambling services using premium SMS services.

Furthermore, since Maltese legislation is technology neutral, the limitations and player protection rules, which apply to on-line gaming, apply also to any form gaming offered by means of distance communications, including mobile telephony or IPTV. Thus the player protection rules, including the rules protecting minors, must be adhered to by licensees when offering any form of gaming by means of distance communications.

**(25) How are commercial communications for gambling services regulated to protect minors at national or EU level? (e.g. limits on promotional games that are designed as on-line casino games, sports sponsorship, merchandising (e.g.**



**replica jerseys, computer games etc) and use of social on-line networks or video-sharing for marketing purposes.**

Regulation 60 of the RGR together with the Code of Conduct on Advertising, Promotions and Inducements issued by the Authority as well as the directions issued by the Broadcasting Authority as explained previously under question 11 contain the limits and restrictions imposed on commercial communications for gambling services to protect minors at national of EU level.

**(26) Which national regulatory provisions on license conditions and commercial communications for on-line gambling services account for the risks described in the Green Paper and seek to protect vulnerable consumers? How do you assess them?**

Regulation 60 of the RGR together with the Code of Conduct on Advertising, Promotions and Inducements issued by the Authority as well as the directions issued by the Broadcasting Authority as explained previously under Question 11 contain the limits and restrictions to protect vulnerable persons.

**Other comments on issues raised in section 2.3.1**

2.3.2. Public order

**(27) Are you aware of studies and/or statistical data relating to fraud and on-line gambling?**

Malta is aware of the following studies in relation to fraud and online gambling:

- The GSMA Discussion Paper: Mobile Money: Methodology for Assessing Money Laundering and Terrorist Financing Risks, January 2010. (accessible on: [http://www.ifc.org/ifcext/gfm.nsf/AttachmentsByTitle/Tool10.11.GSMAMethodology-AssessingAMLRisk/\\$FILE/Tool+10.11.+GSMA+Methodology+-+Assessing+AML+Risk.pdf](http://www.ifc.org/ifcext/gfm.nsf/AttachmentsByTitle/Tool10.11.GSMAMethodology-AssessingAMLRisk/$FILE/Tool+10.11.+GSMA+Methodology+-+Assessing+AML+Risk.pdf) )
- Europe Economics, “Online Gambling: Focusing on Integrity and a Code of Conduct for Gambling,” Report for the European Parliament, Internal Market Committee, 2008.
- A Report prepared for the Remote Gambling Association by MHA Consulting: The threat of money laundering and terrorist financing through the online gambling industry, 2009 (accessible on: [http://www.rga.eu.com/data/files/final\\_\\_mha\\_report\\_june\\_2009.pdf](http://www.rga.eu.com/data/files/final__mha_report_june_2009.pdf) )

**(28) Are there rules regarding the control, standardisation and certification of gambling equipment, random generators or other software in your Member State?**

Malta’s RGR provide for rules which regard what the control system should be composed of and which impose the requirement that gaming equipment and gaming software is to be certified by an independent certifier, as for instance in the case of determining that the

Random Number Generator is truly random and respects the parameters of the regulatory regime. Furthermore, Part V to Part IX of the RGR provide for the technical and control procedural rules that a licensee must abide by in order to conduct its services. Prior to being awarded a remote gaming licence, the applicant needs to undergo a systems audit, which is performed by independent system auditors assigned by the Authority in order to ascertain that all the player protection requirements are in place, that the payment mechanisms used are safe, that proper KYC (Know your client) systems are in fact in place and working, etc.

In 2008, Malta took the lead in developing a minimum standard for regulatory controls on online gaming whereby through the Malta Standards Authority (now the Malta Competition and Consumer Affairs Authority(MCCAA)), MSA 1600-2008 (Remote Gaming – Operators Management System – Requirements) was published using the standards notification procedure instituted by Directive 98/34/EC (known as “TRIS” notification system) referred to in the above reply to question 5 ([www.msa.org.mt/standards/technical\\_committees.htm](http://www.msa.org.mt/standards/technical_committees.htm)). Malta believes that such a standard should be taken in due consideration by the Commission during this fact finding exercise. This standard could be used as a template or a basis for establishing an EEA wide minimum standard in this field.

Moreover, Malta is also aware that the independent software testing laboratory (GLI/TST) released standard GLI-19 in March 2011, (standard on Interactive Gaming Systems), includes standards and requirements for the Gaming Platform, Player Account Management, Game Design, Jackpot Requirements, and Information Systems Requirements including information security, Physical and environmental controls, administrative controls and technical controls, which essentially hold a lot of similarity with the controls imposed on Maltese Licensees.

In addition, Malta is aware that certain standards are adopted by Gaming Laboratories International (“GLI”) a company which tests and certifies gaming equipment. Standards include GLI-19 on interactive gaming systems; GLI-13 on Online monitoring and control systems (MCS) and validation systems in casinos; GLI-26 on wireless gaming systems standards.

**(29) What, in your opinion, are the best practices to prevent various types of fraud (by operators against players, players against operators and players against players) and to assist complaint procedures?**

In order to prevent various types of fraud (be it by the operator against the player, by the player against the operator or by players themselves), Malta believes that the competent regulatory authority plays a pivotal role.

The criticality of having a competent regulatory authority rests on the fact that a priori checks are carried out on applicants for an on-line gambling licence to ensure that such operators have the necessary measures and controls in place to prevent fraud and crimes.

The LGA acts as a gatekeeper through its supervisory role. In fact, by virtue of Article 11(e) LOGA, LGA is empowered to ensure that games and gaming are kept free from criminal activity, and to prevent, detect and ensure the prosecution of any offence related to gaming. As such the LGA is empowered to inquire into the suitability of licensees and the main suppliers thereof, and to ensure that those involved in the operation, promotion or sale of authorised games operated by such licensees are fit and proper persons to carry out their functions relative to such games. In this way the players are already being protected from fraud by the operator.

At the regulatory stage the regulatory authority must ascertain that the operator has the necessary tools in place to take affirmative steps to prevent money laundering and other suspicious transactions which in Malta is addressed through Regulation 8(2)(g) RGR.

As a best practice, Malta believes that any licensed operator must ascertain that it has tools to verify the identity of the player using multiple sources of data and document verification tools, usually used for KYC purposes; automated tools in order to detect collusion, chip dumping and detection mechanisms to avoid players defrauding the operator. In normal processes, operators include IP address and geo-location confirmation as well as tools such as CAPTCHA and telephone call confirmation. These tools serve as a detection mechanism for the operator to prevent and detect fraud from, for example Bots (software applications that run automated tasks over the internet). Other automated tools serve to check fraud between players themselves, such as the already mentioned chip dumping.

From Malta's experience, a regulatory authority also needs to put in place 'post-licensing' checks in order to detect fraud by operators in terms of non-payment of player winnings, which in Malta may tantamount to misappropriation of players' funds. Complaints from players are also an important source of 'fraud alerts', which assist in the investigative process of operator fraud.

**(30) As regards sports betting and outcome fixing - what national regulations are imposed on on-line gambling operators and persons involved in sport events/games to address these issues, in particular to prevent 'conflicts of interest'? Are you aware of any available data or studies relating to the magnitude of this problem?**

Under Maltese law the "Prevention of Corruption (Players) Act" (Cap. 263) provides for the prevention of corruption of players who take part in any game or sport including officials, players and organisers.

Article 3(3) of the Act specifically provides that: "Any person who gives, or agrees to give or offers or proposes to another person, directly or indirectly, that such other person should give or agree to give or offer any gift or consideration to any player or to any official or organiser as an inducement or reward for doing or for omitting from doing, or for having, after the commencement of this Act, done or omitted from doing any act which, if done or omitted, would be in contravention of subarticle (1) or (2), shall be guilty of an offence.

Article 4 also creates a duty to report corrupt practices to the Police. Furthermore, according to Article 8, a licensee of any shop who is aware that an offence against this Act has been committed in his shop, is obliged to notify the Police.

Malta is aware of the data provided by ESSA on its website which reports that the risk of match fixing with EU-licensed operators is very low (<http://www.eu-ssa.org>).

**(31) What issues should in your view be addressed in priority?**

Malta believes, that as the guardian of the EU Treaty, the European Commission should actively work to bring together the various Member States and regulatory bodies to work towards building a regulatory framework at an EU level which promotes regulatory excellence in the spirit of protecting the consumer, and ensures the functioning of the internal market in accordance with the Treaty. Indeed, Malta submits that it should be the aim of an EU consultation to identify whether the current rules applicable to online gambling ensure the proper functioning of the Internal Market and not as is stated in certain parts of the Green

Paper (pages 4, 6, 15) “to ensure the coexistence of divergent national systems”. Malta believes that Union action should aim to establish or ensure the functioning of the Internal Market in accordance with Article 26 TFEU and not solely the coexistence of national laws.

Malta primarily considers that the internal market fragmentation requires a European legislative solution. Malta is aware that maximum harmonisation in the entire gambling sector is politically sensitive but considers that minimum harmonisation for the gambling market would be a workable way forward. Thus Malta considers that a European legislative solution (through minimum harmonisation) is required to address the internal market fragmentation in the gambling sector. In particular, Malta believes that action at EU level is necessary based on the application of the principle of mutual recognition whereby operators licensed in a well regulated jurisdiction like Malta should be allowed to provide cross- border services in other EU Member States without having to obtain prior authorisation where the two countries pursue the same objectives for instance responsible gaming, consumer and player protection, prevention of crime and fraud etc, and where the level of measures applied to attain these objectives are essentially the same or similar. Indeed, all the recently proposed regulatory regimes in order to regulate online gambling have identical overriding public interest objectives. Furthermore, the measures and conditions being imposed on operators by the various jurisdictions to achieve these objectives are strikingly similar as well. This would lead one to believe that a degree of harmonisation may indeed be possible which would ensure that the internal market is reintegrated in this important sector with obvious benefits to Member States, consumers and operators. Furthermore, this would allow the EU together with the Member States to concentrate their efforts on fighting the significant black market.

As an alternative, Malta could as a point of departure, accept an EU instrument which creates a system which would ensure that a service provider licensed in one Member State would, under certain conditions, be able to qualify for a further authorisation to provide its services in another Member State without duplicating requirements and controls already imposed in the former Member State.

Following judgments such as Webb and Canal Satélite, it is indisputable that the receiving Member State may not duplicate controls or impose additional conditions on operators established in other Member States. This principle has been reiterated most recently by the Grand Chamber of the CJEU in Neukirchinger. In practice what this means is that when faced with an operator already licensed in the EEA, a Member State should – before imposing controls and requirements already imposed and approved in another Member State - assess the similarity between the legislation of the two Member States concerned with regard to the conditions under which the licences at issue are granted. If a Member State requires a person to obtain a new licence, without due account being taken of the fact that the conditions of issue are, essentially, the same as those applying to the licence already issued to him in another Member State, then this constitutes a disproportionate restriction even if pursuing legitimate objectives.

By way of example, where the fairness of a game is certified by an independent certification body which carries out an evaluation as to the actual randomness of the Random Number Generator (RNG) of a game, why should an operator with the same RNG approved in one jurisdiction, have to repeat the certification and testing procedures in another EEA Member State? Also where a Member State carries out a very thorough test of “fit and proper”, as for instance such as those carried out in Malta where the checks are done up to the ultimate beneficiary owner, once approved, why should similar controls be duplicated on the same person by other EEA jurisdictions? For example, if an operator listed on an EU stock exchange applies for a gaming licence and is subject to an assessment of fit and proper by the listing authority and is duly certified by that listing authority, then such certificate should be

accepted in other jurisdictions and controls not duplicated for the purposes of fit and properness.

In order to effectively apply this principle with least administrative burdens for Member States, Malta proposes that either (1) specific regulatory cooperation be carried out through a proper structure possibly assisted by the Commission to exchange information with the aim of helping Member States become familiar with each other's legislation regarding the issuing of licences and the controls which are thereby applied. This would also be a first step towards building mutual trust; or (2) the Commission could carry out this role itself and give genuine effect to the principle of non duplication by regularly circulating updated information about Member States requirements, conditions and controls among all Member States. Indeed, the Commission is already in possession of this information as every draft national legislation has to be notified to the Commission through the TRIS procedure established by Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services.

Malta also highlights that we need targeted harmonisation to cover particular sectors. Therefore Malta believes that EU action is necessary in the following areas:

1. Consumer protection (for players, minors, vulnerable, problem gamblers);
2. Prevention of money laundering (by broadening the scope of the Anti-Money Laundering Directive), anti -fraud measures and prevention of other crime;
3. Regulatory requirements and controls;
4. Player registration and verification;
5. Sports integrity;
6. On-line payments;
7. Server hosting requirements.

Malta believes that minimum standards on the above points are required.

Indeed, in the absence of any form of minimum standards across the EEA, in 2008, Malta took the lead in developing a minimum standard for regulatory controls on online gaming whereby through the Malta Standards Authority (now MCCA) MSA 1600-2008 (Remote Gaming – Operators Management System – Requirements) was published using the normal standards notification procedure ([www.msa.org.mt/standards/technical\\_committees.htm](http://www.msa.org.mt/standards/technical_committees.htm)). Malta believes that such a standard should be taken in due consideration by the Commission during this fact finding exercise, which could be used as a template or a basis for establishing an EEA wide minimum standard in this field.

Malta believes the rules regarding control, standardisation and certification of gambling equipment, random generators and software as well as licensing processes should be addressed as a priority. Malta would refer once again to the examples cited in paragraph 5 above on avoiding duplication of RNG certification and testing procedures and “fit and proper” tests.

Furthermore Malta is of the opinion that the Anti Money Laundering Directive should be extended to all remote gaming activities. Moreover, Malta believes the EU should act in the interest of consumer protection (for players, minors, vulnerable, problem gamblers). In

particular Recital 14 providing for 'an extension' of the activity by means of the internet could be extended in order to include other products which fall under gaming but go beyond the product of casino.

Finally Malta agrees that the integrity of sports needs to be safeguarded in all senses, including but not limited to combatting doping and match fixing. In this respect Malta would refer to the early warning system implemented by leading European online gaming operators within the European Sports Security Association (ESSA) , in particular sports book operators, whereby any irregular betting patterns or possible insider betting from within each sport is monitored and any suspicious betting activity is alerted and then immediately notified to the regulator with the aim of preventing game manipulation on a given event. Malta infact encourages its licensees to collaborate with sporting bodies on sports integrity issues. Infact more than half of the members of ESSA are Malta Licensees.

Furthermore, Malta believes an EU wide framework to fight match fixing together with educational campaigns for sportspeople, is essential to ensure sport integrity. In this respect Malta notes with the interest the proposal put forward in the draft European Parliament ECON report to create a centralised and independent entity to fight corruption in sport and ensure integrity and fair play. In this case, however, Malta believes such a body should be endowed with its own legal personality and budget possibly funded in liaison with the revenues sought to be generated through a potential contribution from online gaming activities to sport associations. Indeed such revenue received by sport associations, or a portion thereof, should be directly channelled to this body to build and maintain expertise, processes and systems to ensure sport integrity.

**(32) What risks are there that a (on-line) sports betting operator, which has entered into a sponsorship agreement with a sports club or an association, will seek to influence the outcome of a sports event directly or indirectly for profitable gain?**

Malta submits that licensed and strictly regulated online betting operators, who seek to obtain high standards of compliance, adopt business models which will render a long-term viable operation. In this industry, consumer trust plays a very important role in the success or otherwise of the licensed on-line betting operation. Reputational risk is amongst the risk areas which are given specific attention by on-line betting operators who seek to have a viable business which is legal. The involvement of a sports betting operator in trying to influence the outcome of a sports event “could” result in short term profitable gain, however the fact that the event was manipulated would tarnish the reputation of such operator at the expense of long term profits. Thus it would not be in the interest of a licensed operator to engage in such a manipulation. On the other hand, if an operator is not regulated or licensed from any EEA state, the business model it adopts is specifically designed and built on achieving “short term gain” thus the risk of manipulation in such cases is evident.

In reality although risks are present, according to the LGA these are more present in individual sport than in team sport (see for example John Higgins in snooker <http://www.telegraph.co.uk/sport/othersports/snooker/7668719/John-Higgins-snooker-match-fixing-scandal-full-transcript-of-Kiev-meeting.html>).

**(33) What concrete cases are there that have demonstrated how on-line gambling could be used for money laundering purposes?**

Like all designated non-financial businesses, online gaming is vulnerable to Money Laundering and Funding of Terrorism. Indeed, given that payments in the on-line realm originate from 'clean' sources, that is, banks etc, then the risk and threats of terrorist financing

is seen as lower. We have had instances where operators noticed, detected, reported and stopped 'losing on purpose' (chip dumping). In some of these cases the risk and threat was not actually of transferring funds to finance crime but simply to deplete a bank credit card from its funds and transfer them to the perpetrator's account.

Moreover, the Financial Intelligence Analysis Unit (FIAU), which is the competent authority in the field of prevention of money laundering, issues an annual report containing statistics in relation to money laundering including statistics on suspicious transaction reports filed by remote gaming operators. See ([www.fiumalta.org/annual-report](http://www.fiumalta.org/annual-report)).

**(34) Which micro-payments systems require specific regulatory control in view of their use for on-line gambling services?**

Micro payments are very small, actually too small to be used for money laundering purposes. In this respect one should also bear in mind that larger payment systems such as Visa/MasterCard offer no name cards that can be bought from shops with various denominations for example in Malta the value of such cards can go up to €250. Such cards may pose more difficulties, from a control perspective, than micro payments systems. Malta, therefore, believes that regulatory control should not be payment specific but should apply across the board to ensure the objective one wants to achieve, for example protection of minors, is achieved irrespective of the payment system used.

Malta always advocates keeping laws technology neutral and this should also be the guiding principle for payment regulation. Regulation should apply to any payment system indiscriminately so as not to create distortions in the market and not to entice alternative "creative" payment solutions. Indeed all payment gateways should be licensed by Financial Service Authorities in the EU/EEA area.

**(35) Do you have experience and/or evidence of best practice to detect and prevent money laundering?**

Maltese licensed operators must abide by anti-money laundering legislation. Indeed a whole array of measures are carried out to prevent, monitor and report money laundering or other criminal activities and the LGA is endowed with inspection and enforcement powers which could lead to hefty administrative penalties as well as suspension or cancellation of a licence, or criminal prosecution. The LGA is also designated as a "supervisory authority" on the prevention of money laundering under the Prevention of Money Laundering Act thus creating responsibility for ensuring preventive measures are in place across its licensees in this respect. The LGA is also responsible to report to the competent authority (the Financial Intelligence Analysis Unit (FIAU)) any suspicious transactions that may involve money laundering or the funding or terrorism. The LGA and the FIAU have a Memorandum of Understanding (MOU) in place for mutual assistance and collaboration on matters pertaining to the prevention of Money Laundering.

In particular, with respect to money laundering and other crime in Malta, the following measures are carried to prevent, monitor and report money laundering or other criminal activities:

- In the pre-licensing compliance checks LGA requests true copies of the agreements between the operator and the payment gateway in order for LGA to ascertain that the payment gateways are licensed by a Financial Services Authority within the European Economic Area;

- The LGA's ongoing monitoring units, check that the operator only accepts transactions from licensed financial entities;

- Licensed financial entities carry out their own additional and separate checks on players, their accounts, their identification, including verification, and monitor transactions in conformity with the regulatory frameworks they fall under, thus in practice having a parallel system of monitoring such transactions. Financial services are also subject to Anti Money Laundering obligations as 'subject persons'; According to Maltese legislation, funds remitted by the internet gambling operator to the player must be remitted to the same account from which the funds were originally paid. Specifically this process is stipulated in Regulation 37(2) RGR. Regulation 40(1) of the RGR states that a licensee shall keep players' funds separately from the licensee's own funds in a Clients' account held with an EEA licensed credit institution approved by the Authority. Furthermore, if LGA detects that a licensee did not comply with regulation 37(2) the licence may be revoked. This mitigates the risks that are related to the usage of third parties;

Specific legal requirements are in place to mitigate the risks associated with Money Laundering / Financing of Terrorism, specifically related to internet gambling, where measures and tools are implemented by the competent authorities in order to supervise the activities of those operators and monitor the financial transactions related to this type of activity. According to Regulations 8 and 9 of the RGR, LGA shall not issue or renew a licence unless it is reasonably satisfied that all persons involved in the applicant body corporate are fit and proper persons. Furthermore the licensee is required to take affirmative steps to prevent money laundering and other suspicious transactions, where such operator based processes are audited by independent auditors appointed by the LGA.

Each operator must conduct a risk assessment to ensure their business follows the principles of Customer, Product, Financial, Geographical and Activity risks. These risks should be monitored and reviewed on a regular basis in order to ensure that risk mitigation requirements can be added, altered or deleted accordingly to the adopted risk model. Some operators use a scorecard approach, whilst others use a traffic light system as way to facilitate its management.

Malta's licensees are encouraged to submit STRs (Suspicious Transaction Reports) if they suspect that Money Laundering or Financing of Terrorism is occurring on their site. Furthermore, the companies remain a client in the eyes of the bank and therefore may be subject to a STR raised by the bank. The LGA reports that experience has proven that this is a very effective practice to detect and prevent money laundering. Moreover Malta's FIAU receives STRs raised by remote gaming operators as confirmed in the annual report referred to in the reply to question 33 above. As a matter of fact LGA obliges its licensees to adopt the four (4) pillars in the prevention of Money Laundering or Financing of Terrorism. that is, they must have in place: Internal and external reporting procedures; nominate a Money Laundering Reporting Officer; implement record keeping procedures and adopt enhanced due diligence processes and procedures.

**(36) Is there evidence to demonstrate that the risk of money laundering through on-line gambling is particularly high in the context of such operations set up on social web-sites?**

While risk may be present, Malta believes that given that the payments originate from cards and bank accounts then by eliminating cash, the influx of 'dirty money' is mitigated. In addition, given that a lot of transactions and purchases are performed on the internet, this risk



is not increased. In any case regulators still assess the amounts, the country of origin of the player, etc in the same manner as if the player were present. Enhanced due diligence and ancillary checks provide a thorough identity verification. Furthermore in the online business model, it is understood that the track record and traceability of transactions is very evident. LGA places utmost importance on data collection and data preservation in record keeping requirements.

**(37) Are national e-commerce transparency requirements enforced to allow for illegally operated services to be tracked and closed? How do you assess this situation?**

In Malta a licensee is required to submit, on a monthly basis, player and gaming data, player balances in the gaming system and players' bank account statements. The licensee is also obliged to submit audited financial statements on a six monthly basis. These requirements ensure that services are transparent and allow the Authority to track any suspicious transaction.

The LGA's logo found on the website of its operators is also evidence of the fact that the relevant operation is in fact licensed and hence, when a licensee acquires this mark there are also other requirements that need to be adhered to and clearly stipulated in their Terms and Conditions of the licensee's games; for instance the procedure on how a player may lodge a complaint or how he or she may contact the Authority in order to lodge a complaint if such complaint has not been directly dealt with by the licensee. In practice, within LGA's complaints department, a focussed team assesses each complaint individually and investigates the matters reported by channelling such request/complaint to the relevant departments within the Authority who are empowered to use all necessary processes to determine, assess and sanction any potential illegal activity.

The above applies to all Maltese licensed operators including those who provide cross border on-line gambling services and these rules are monitored and enforced effectively against all licensees by the LGA.

**Other comments on issues raised in section 2.3.2**

2.3.3. Financing of benevolent and public interest activities as well as events on which on-line sports betting relies

**(38) Are there other gambling revenue channeling schemes than those described in the Green Paper for the public interest activities at national or EU level?**

Article 59 LOGA, creates a revenue scheme to support good causes by requiring the holder of the national lottery license to set up a so-called "reserve" with any unclaimed prizes, and furthermore to pay such funds standing in the latter reserve to the LGA. All funds received by the Authority are to be credited to the National Lottery Reserve Fund and in accordance with the same Act, all funds credited to the latter reserve must be paid to the National Lottery Good Causes Fund held by the Treasury Department within the Ministry of Finance, the Economy and Investment. The Good Causes Fund is also made up of a percentage of tax which is collected from gaming activity.

Furthermore, LOGA also provides for a Responsible Gaming Fund in which there shall be credited a percentage of tax and, or gross fees paid by licensees for the purpose of promoting responsible gaming, including but not limited to the provision of grants for projects, activities, research and educational programmes relating to responsible gaming as prescribed in Article 78 (2) (m) of the LOGA. Indeed the LGA is in the process of establishing a Play Responsibly Trust which will contribute to financing of preventive actions, measures and treatment for problem gambling, whilst promoting responsible gaming. Online gaming operators have signalled their intention to place contributions for these purposes with the Play Responsibly Trust.

**(39) Is there a specific mechanism, such as a Fund, for redistributing revenue from public and commercial on-line gambling services to the benefit of society?**

As mentioned in the reply to Question 38 above, the Good Causes Fund in Malta is made up of unclaimed prizes as well as from tax payable on gaming activities and it is distributed amongst different organisations in society which are in need of such funds – these also include sporting organizations and as a result it can be said that revenue secured from gambling (in the form of the national lottery) is redistributed to the benefit of society.

The Maltese Gaming Legislation, through its RGR also provides for situations where client accounts which are dormant for more than 30 months, and provided that the account holder is not traced for funds withdrawal, have such funds remitted to the authority. Following an investigation carried out by the Authority, if such a holder of a dormant account proves once again not to be traceable, such funds may be used by the Authority for Responsible Gaming initiatives. Regulation 39 states: “if no transaction has been recorded on a player’s account for thirty months, the licensee shall remit the balance in that account to the player, or if the player cannot be satisfactorily located, to the Authority”.

Moreover, Regulation 32(3) of the RGR, which deals with underage playing states that “No person under eighteen years of age may be registered as a player and any funds deposited or any money won by such persons shall be forfeited to the Authority”. Thus, in the event that an underage player manages to bypass the first level of checks of an operator and manages to deposit, such by passing is usually detected at the second level of player verification check, where the licensee is obliged to close such an account, report the matter to the Authority and remit such funds to the Authority, where the Authority would use such funds for Responsible Gaming initiatives.

**(40) Are funds returned or re-attributed to prevention and treatment of gambling addiction?**

In Malta, a percentage of taxes raised from online gaming operators is channelled, on an annual basis, from the Government’s main consolidated fund to the Ministry for Education, Employment and Family, which is the Ministry responsible for addiction and other social issues, following approval by Parliament. Furthermore, LGA is in the process of establishing a Play Responsibly Trust, which will contribute to financing of preventive actions and treatment for gambling addiction.

**(41) What are the proportions of on-line gambling revenues from sports betting that are redirected back into sports at national level?**

During the last 5 years, the percentage allocated from the good causes fund to support sports was 32.93% of the total contributions received. Furthermore, over the same period, 43 sporting associations and 77 sporting clubs benefitted through the same fund.

Furthermore, online gaming revenues are channelled into the sport sector in particular through sponsorship agreements and related advertising with sport entities, the majority of which operate at an amateur level in Malta.

**(42) Do all sports disciplines benefit from on-line gambling exploitation rights in a similar manner to horse-racing and, if so, are those rights exploited?**

No, there are no local on-line gambling exploitation rights. However, Malta considers that such 'rights' and mechanisms do not actually exist, neither in the form of Intellectual Property Rights nor under any other legal right. Malta acknowledges, however, that the sports industry is calling upon the Commission to create some form of right; however in this respect, Malta would simply caution that any such right would need to be assessed against, amongst others, the EU rules on Competition law.

It should also be highlighted that betting operators pay very significant amounts of money to obtain media rights in order to allow for the streaming of such sporting events, for example for providers such as thesportsman :( <http://www.thesportsman.tv/eng/>).

**(43) Do on-line gambling exploitation rights that are exclusively dedicated to ensuring integrity exist?**

Malta is not aware of any such rights.

**(44) Is there evidence to suggest that the cross-border "free-riding" risk noted in the Green Paper for on-line gambling services is reducing revenues to national public interest activities that depend on channelling of gambling revenues?**

Malta fully recognises that Member States are free to channel funds to certain socially beneficial and even charitable causes, directly or indirectly, from gambling sources. However, Malta does not agree that online gambling services which are licensed in one Member State and operate cross-border negatively affects such channelling of funds, even less so that it constitutes a 'free riding problem'.

If the provision of online gaming services by duly licensed EEA operators on the basis of the EU Treaties were to be considered "free riding" then this would imply an acceptance of the argument put forward by a number of Member States that national restrictions (through national authorisations) on such services are to be considered as justified in order protect such revenue streams. In this respect it is worth highlighting the most recent preliminary judgement, Zeturf (C-212/08) issued by the CJEU on 30 June 2011 where the CJEU confirmed once again that such funding of good causes does not constitute a valid justification for national restrictions to the free movement of services. Indeed according to the CJEU such considerations, such as sports funding, may only be ancillary and thus cannot by themselves be relied upon to support and justify restrictions to the freedoms of establishment and provision of services.

Another consideration Malta would like to submit that jurisdictions like Malta (2001 – 2004) followed by the UK (2005) invested heavily both in physical infrastructure (as in the case of

Malta) and more importantly in creating a sound and robust regulatory framework for the regulation of online gaming services. The spate of regulatory regimes that are being launched in recent years by Member States could, if one were to adopt the logic of “free riding” as laid down in the Green Paper, be seen as benefitting from the experiences gained by these jurisdictions who approached these markets responsibly and holistically through specific regulatory frameworks that fuelled this sector’s growth and popularity. Such an interpretation of the notion of “free riding” would lead to a conclusion that these Member States are “free riding” on the success of the Member States like Malta.

Malta believes that if it is considered that there is a need to ensure or maintain the generation of funds for these causes, then discussions should be evidence based and focus on how to restructure the sources and mechanisms for generating funds for these causes, even from the same gambling sector. Without prejudice to the legitimacy of certain monopolies (such as in Portugal as concluded by the ECJ in *Liga Portuguesa*, and in Sweden in *Otto Sjoberg* and *Geradin* where the CJEU has in principle accepted the territorial exclusivity and non-compete measures) and after excluding possible state aid issues, Malta believes Member States should instead look at the potential revenue-generating capacity of other market structures and financing mechanisms employed by Member States in other sectors of equal or more universally important public interests.

Therefore Malta recognises that Member States have legitimate concerns in the restructuring of their revenue channelling mechanisms currently in place in order to ensure adequate financing to their legitimate benevolent causes however, this should not be erroneously portrayed as a problem of “free riding”.

**(45) Do there exist transparency obligations that allow for gamblers to be made aware of whether and how much gambling service providers are channelling revenues back into public interest activities?**

There are no such obligations under Maltese legislation however Maltese licensed operators do channel revenues into activities of public interest, which are of public knowledge, such as the funding of the annual “Life Cycle challenge” which is an event that sees amateur cyclists cycle through Europe in aid of raising funds for medical equipment, the annual Christmas national fund raising event under the patronage of the President of Malta for the funding of social causes (Istrina Community Chest Fund) etc.

Moreover, Malta believes that special care should be given to the notion of transparency obligations so as not to allow gaming operators to abuse of this notion in order to entice the public to play on their particular games. In any event, should such transparency obligations become the subject of discussions for its implementation on a EEA level, a dedicated “Advertising Code” should provide for the principle that gaming operators cannot make use of such transparency obligations as means of marketing their services and thus entice players to engage in their gaming service for the simple reason that their games are “dressed” as being of social benefit. Indeed this was the CJEU’s conclusion in *Zeturf* (C-212/08) which held at paragraph 71 that,

... any advertising issued by the holder of a public monopoly must remain measured and strictly limited to what is necessary in order thus to channel consumers towards controlled gaming networks. Such advertising cannot, on the other hand, specifically aim to encourage consumers’ natural propensity to gamble by stimulating their active participation in it, such as by trivialising gambling or giving it a positive image owing to the fact that revenues derived from it are used for activities in the public interest, or by increasing the attractiveness of

gambling by means of enticing advertising messages holding out the prospect of major winnings (Stoß and Others, paragraph 103).

### **Other comments on issues raised in section 2.3.3**

#### Sports funding related issues in Green Paper

##### Introduction

Malta recognises the essential role of sport in European society and its importance for citizens. Malta also recognises that sport is also confronted with new threats and challenges which have emerged within the European society, such as commercial pressure, exploitation of young players, doping, racism, violence, corruption and money laundering. Malta has always supported the importance of ensuring that sport has the necessary funding in order to (i) sustain educating the younger generation to actively engage in a sport discipline so as to have a healthy Europe, (ii) sustain grass root sports which predominantly do not have the same popular following of the disciplines such as for instance football, basketball and horseracing, and (iii) sustain preventive measures so as to keep competitive sport clean from substance abuse, corruption and match fixing.

Malta believes that all sports, especially grass-root levels, should benefit from financing. However the model for such financing needs evidenced based discussions to ensure that it is indeed a model which will benefit sports in general (i.e. all levels including grass roots and objectives important to the activity in general for example fighting doping, corruption, match fixing ). In particular whichever model is adopted should not be subject to the control or conditions of sports bodies themselves or national authorities. Therefore an independently functioning model of financing could be acceptable to Malta as long as this does not lead to market foreclosure or include any exclusionary conditions. Hence Malta considers that the mechanisms by which such funds are or could be extracted, either directly or indirectly, from the on-line and off-line gaming industry need to be based on a model that takes the above concerns into account and is based on (i) fairness and fair distribution, (ii) non-discrimination, (iii) not disproportionate, (iv) contributes to financing pre-determined objectives important to the sports industry in general (anti-doping, anti-corruption, anti-match fixing) and (v) ensuring that all sport disciplines are beneficiaries, as is explained in more detail below.

##### Financing Models

In the Commission's White Paper on Sports (The White Paper on Sports issued by the Commission on 11 July 2007 (COM (2007) 391 final) the Commission called upon Member States to 'reflect upon how best to maintain and develop a sustainable financing model for giving long term support to sports organisations'. In subsequent discussions held on this White Paper in various Councils and working party fora Malta has consistently supported and continues to support this over-arching aim of sustainability and the development of long-term support mechanisms to sports organisations, in particular, amateur and grass-root sports that usually are non-profit entities or do not typically attract lucrative sponsorship deals. In particular Malta is of the opinion that although some financing models are indeed long-standing and traditionally reliant on gaming markets that are facing very significant reforms and developments; the gaming market could continue to contribute to sports irrespective of market structure and developments.

Some jurisdictions have created voluntary mechanisms (such as the horse betting levy in UK) or even compulsory as in the case of France. Some Member States and sport federations and clubs have been claiming and attempting to impose a fee on gambling and betting companies for the 'right' to use their names and events for taking bets. Sports bodies have been searching for legal justifications to make bookmakers pay a 'fair return' for the use of their events with increasing calls from the sports industry to protect its 'sports' rights' and 'betting rights'. The litigation brought by both sides in front of various national courts and the Court of Justice of the European Union have, to date, exposed the limited use of intellectual property rights for the sports industry to impose rights fees on the betting industry. Therefore, it is reasonable to say that these claims are more founded on the need to secure funding and profits for sports rather than in 'protection of rights' itself. Malta believes that indepth discussions to find suitable long-term solutions should be carried out once the Study being conducted on "Internal market barriers to funding of grassroots sports" has been published. This should provide invaluable information for the legislator to be able to identify the funding models that currently exist, their reach and efficiency and assess the need for reform. This together with the responses submitted to this Green Paper should form a unique and informed platform for further discussions.

Malta also recognises that the betting industry's contribution to sports should not infringe state aid rules and other matters of competition law as mentioned in the Communication of the Commission 'Developing the European Dimension of Sports'. Malta notes that sports funding related issues are included in the Commission's Green Paper under the title text of Section 2.3 (Public Interest Objectives). In this respect Malta would primarily like to point out that, as stated by the Commission in the Green Paper:

Restrictions on gambling services at national level are at times justified by policy reasons such as the financing of benevolent or public interest activities. Notwithstanding that the systems put in place for this purpose should comply with applicable state aid rules, it is noteworthy that according to the Court of Justice the funding of such social activities may not constitute the substantive justification for the restrictive policy but only an ancillary beneficial consequence. Such restrictions seek to assist the funding of "public interest activities" that society at large can benefit from. More specifically, the public interest activities that currently benefit directly in this manner in the Member States are the arts, culture, sport, youth/educational programmes and charity related activities.

In this respect the most recent preliminary judgement, Zeturf (C-212/08) should be noted which specifically related to sports funding and encapsulates previous Court statements that channelling of revenues to good causes, including sports cannot by themselves be relied upon to support and justify restrictions to the freedom of establishment and freedom to provide services:

"51. In relation to the third objective of the legislation at issue in the main proceedings, cited as a subsidiary matter by the French government, it should be noted that rural development, as identified by that government, can be equated, in the context of the case in the main proceedings, with the financing of benevolent or public interest activities in Case C-275/92 Schindler [1994] ECR I 1039.

52 In that regard, the Court has stated on several occasions that, although it is not irrelevant that a levy on the proceeds of authorised gambling may contribute significantly to the financing of such activities, such a ground could constitute only an ancillary beneficial consequence and not the substantive justification for the restrictive policy established (see, to that effect, Schindler, paragraph 60, and Case C-67/98 Zenatti [1999] ECR I 7289, paragraph 36). Indeed, it is settled case law that economic grounds are not included in the grounds listed

in Articles 45 EC and 46 EC and do not constitute an overriding reason in the public interest capable of justifying a restriction on the freedom of establishment or the freedom to provide services (see, to that effect, Case C-243/01 Gambelli and Others [2003] ECR I 13031, paragraph 61 and case-law cited, and Case C-153/08 Commission v Spain [2009] ECR I 9735, paragraph 43).

53 It follows, a fortiori, that such an objective cannot justify the establishment of a measure as restrictive as a monopoly. The subsidiary objective, according to which the establishment of a monopoly in the area of off-course betting on horseracing is intended to contribute to rural development, cannot therefore constitute a justification for the restriction on the freedom to provide services introduced by the national legislation at issue in the main proceedings.”

The “Possible existence of principle of return to event organisers”

The Green Paper states that ‘National and non-domestic sport events are used by on-line operators to present an attractive selection of gambling services to their potential customers’ and that such events ‘may benefit from such gambling activities in that they create additional public interest and possibly also increase the event’s media exposure’. It goes on to say that there is a broad consensus that sports events, on which gambling relies, should receive a fair return from the associated gambling activity. Malta submits that it is not aware of any broad consensus that it should be the gambling industry which should finance sport events. Infact a conclusion such as this preempts the outcome of the Commission’s recent Communication entitled “Developing the European Dimension in Sport” [COM (2011) 12] issued on 18 February 2011 according to which there is a high level of consensus among Member States that the sustainable financing of grassroots sport should be a priority topic for discussion in the EU agenda for sports. It by no means mentions where this financing should come from and is still at the consultation stage to raise this issue for discussion and indeed the study mentioned above is eagerly awaited..

The Green Paper depicts two scenarios: one that relates to horse racing. With respect to horseracing Malta would submit that the CJEU in Zeturf, cited and quoted above (paragraphs 51 to 53) should be borne in mind, in particular para 54 which states:

“Furthermore, it should be noted that, contrary to the contention of the French Government, Article 4(2) of Directive 90/428 does not implicitly or explicitly authorise the allocation of the proceeds of betting on horseracing to the safeguarding, development or improvement of breeding and rearing of equidae. That directive does not have the objective of regulating gambling linked to horse races. It is intended only to eliminate any discrimination against horses registered in a Member State, or originating in a Member State, other than that in which they participate in competitions. Those competitions are defined in the second paragraph of Article 2 of that directive, that provision being referred to in Articles 3 and 4 of the directive. The option afforded to the Member States by Article 4 of the directive, to reserve a percentage of the prize money or profits resulting from those competitions, makes explicit reference to the obligations set out in Article 3. It is therefore the profits and prize money generated by those horses that are referred to in Article 4(2) of Directive 90/428 and not the proceeds of the betting on horseracing organised on the occasion of such competitions.”

Malta would like to address the cited example of the French sport betting right. Malta would not welcome the adoption of this particular model at EU level which has proved inefficient in terms of revenue generation and lacking in safeguards which Malta considers crucial to the adoption of any financing model. Indeed Malta has reservations on the creation of a new ‘sport

right' as such a right could amount to a de facto restrictive measure, and appears to be a mechanism that would only fund the popular and elite competitive sports. Whilst Malta is not against popular competitive sports also obtaining 'fair funding', however Malta considers that the creation of a new right which, to date, has no legal basis and which is surrounded with issues pertaining to fair competition and discriminate restrictive measures would be problematic. In addition Malta would like to bring to the fore that on-line betting is already an important financial contributor to competitive sports across the EU, whereby most sporting events and a high incidence of sport clubs already benefit from lucrative sponsorship arrangements. Thus Malta believes the introduction of a financing model for sports should address the following issues as priority.

As stated above Malta agrees with the principle that sports, especially grass-root levels, should continue to benefit from financing and can also agree that sports should receive an amount of funding derived directly or indirectly from both offline and online gaming activities. Malta however believes that the model for such financing needs to be thought through and while ensuring money is channelled to sports, it should not be subject to the control/conditions of sports bodies themselves or national authorities. Therefore an independently functioning model of financing, with least burdens on the gaming industry, could be acceptable to Malta but the EU legislator should resist any model of financing which could lead to market foreclosure for example where national vetting is required, or exclusionary conditions can be imposed, as this would cause further ambiguity and legal uncertainty

In particular it is essential to ensure that if a "sports or betting right" is introduced, the price for such right should not be too high as this would weigh on the operators' economic viability thus constituting an entry fee that could block their entry to the market. Indeed one must also bear in mind that betting operators already pay very significant amounts of money to obtain media rights in order to allow for the streaming of such sporting events. Possibly ex ante regulation or a dispute settlement mechanism would need to be introduced to determine the fair price.

Terms and conditions should detail the process of consultation between sporting bodies and betting operators in order to ensure the transparency of the financing model/betting right so as to avoid any discrimination between operators. In particular an independent entity/authority should guarantee transparent and non-discriminatory access to sport data required by betting operators.

Safeguards should be laid down to ensure revenues generated through this right/financing model is indeed channelled to grass-root sports and to pre-determined objectives for example to finance the prevention of matchfixing initiatives. Indeed Malta agrees that the gambling and betting industry as a whole, both online and offline, have a role to play and should be involved in ensuring sport integrity. Thus an EU wide framework to fight match fixing together with educational campaigns for sportspeople, are essential to ensure sport integrity and any revenues from this financing model should go towards such initiatives. Indeed Malta notes with interest the proposal put forward in point 5 of the Draft Report of the Committee on Economic and Monetary Affairs(ECON) of the European Parliament to create a centralised and independent entity to fight corruption in sport and ensure integrity and fair play. Malta believes such a body could be endowed with its own budget, in liaison with the revenues sought to be generated through a potential contribution to sport associations whereby such revenue received by sport associations, or a portion thereof, should be directly channelled to this body to build and maintain expertise, processes and systems to ensure sport integrity



In conclusion Malta submits that in seeking to establish a viable model for financing of sport, one must bear in mind that betting operators duly licensed in the EEA already face substantial competitive pressure from illegal gambling operators providing services in the EU without any licence and thus without any regulatory constraints. If the Member States and EU institutions agree that, as a priority, the Union should focus its efforts on exploring ways to eradicate illegal gambling as much as possible and creating incentives for such operators to regularise themselves by obtaining a licence in a Member State of the EEA, then in attempting to define a new financing model for sports from gambling activities one should take account of the the costs and burdens already faced by the fewer legal operators operating within the EEA. Malta believes that if we do not approach this cautiously we risk losing the legal operators to the already well established black market which would leave us without any market at all on which to impose this sort of funding.

Without prejudice to the above, Malta recognises that Member States have legitimate concerns in the restructuring of their revenue channelling mechanisms currently in place in order to ensure adequate financing to their legitimate benevolent causes. . In view of this Malta would like to put forward a possible model based on a number of essential principles and criteria which are of equal importance:

i. Rate of return: the rate of return should be based on actual costs or projected to be incurred and eligible for compensation. This should include measures and mechanisms in place in order to ensure the integrity of the sports concerned; any compensation for public service missions entrusted to the respective organisation and possibly an allocation for the funding of grass-root sports to be payable to Government or other entity entrusted with such mission. The rate of return, translated into sports contribution' to be made by betting organiser, should not prove to be too high and act as a deterrent or have any other qualitative or quantitative foreclosing effects as recommended by the French Competition Authority in its opinion of January 2011 referred to earlier in this section. Within this context, Malta does not subscribe to the notion that Sports Clubs/teams should be entitled to impose such a requirement on betting organisers to make established contribution.

ii. Universally applicable: the sports contribution should be transparently set and applied to all forms of betting, whether online or offline, and whether provided by the same sports organisation or affiliated organisation or any other state or private entity.

iii. Universal access: Following from (ii) above, the possibility to bet on sports events, subject to the payment of the applicable rate of contribution should be universally accessible to all betting operators, without discrimination, restriction or other foreclosing conduct.

iv. Segregation of accounts and activities related to betting activities: the fulfilment of criteria under (i) and (ii) would essentially require the transparent segregation of accounts in order to establish the basis on which the rate of return/contribution is set and (b) to clearly separate betting activities conducted by same organisation or directly related entity from any other activity whether these are state owned or privately owned. Such separation of accounts should eliminate any possibility of cross-subsidization between monopolistic activities (such as horse race organisation, or the running of off-line betting network) from online betting operations.

v. Regulatory oversight: In turn, in order to fulfil the 4 criteria above, it would be essential for the Member State to monitor through a regulatory body the setting and application for such a sports contribution . Malta envisages two options: (i) sports contribution is set by the sports organiser, in advance and transparently following the approval by the relevant competent regulatory authority; or (ii) transparently imposed and

agreed upon through negotiated agreements between the sport organisation and betting companies.

vi. Financing allocation: apart from the issues highlighted under (i) that Malta considers as essential in order to establish a fair and equitable contribution for both the sports organisations and the betting entities, it would be necessary that any financing of sports made by governments does not constitute illegal state aid. Moreover, Malta strongly suggests that governments and/or sports organisation make adequate allocation from such contributions in order to ensure that integrity of all sports. For this reason, Malta is also in favour of suggestion number 5 included in the draft Opinion of the Committee on Economic and Monetary Affairs(ECON) of the European Parliament which “calls for the establishment of a European Agency for Integrity and Fair Play in Sport consistent with Articles 6, 83 and 165 of the Treaty on the Functioning of the European Union, with a specific remit to promote player education and coordinate action against fraud and corruption in sport by sharing information and expertise and by applying the common definition of offences and sanctions”. Malta would not object to the notion that funds collected through the sports contribution mechanism can be allocated in order to fund such initiative. Equally important is that proceeds from the collection of such contributions are allocated fairly and through a government controlled or supervised entity to grass roots sports.

In conclusion, should the concept of ‘fair return to sport’, as mentioned in the Green Paper, be taken further then Malta considers that this could be a possible option that could be considered and could be explored further, provided that such a model is universally applicable to all forms of betting and does not have exclusionary effects or lead to foreclosure of certain betting markets.

Malta also believes that the existing national funding mechanisms to fund sport and grass root sport through existing good causes funds should be retained and strengthened, and that any other sport funding model would not compromise the funds available to sustain sports at a national level.

#### 2.4. Enforcement and related matters

##### **(46) Which form of regulatory body exists in your Member State and what are its competences, its scope of action across the on-line gambling services as defined in the Green Paper?**

As part of Malta’s gaming policy, insofar as ensuring that all forms of gaming are thoroughly regulated, Malta, through an Act of Parliament, the Lotteries and Other Games Act, 2001 (“LOGA”) established the need to have a focused regulatory authority which had the necessary powers and independence to perform all the necessary regulatory functions in order to effectively control and monitor the gaming market, whilst having powers of enforcement in the event of breaches to the gaming legislation. In order to ensure that the Authority would be truly independent, the LOGA placed all the necessary caveats in order to ensure that the Lotteries and Gaming Authority (LGA) would be financially self sufficient. For matters of National Policy, the LGA falls under the portfolio of the Ministry of Finance, the Economy and Investment and is guardian of the Lotteries and Other Games Act, 2001 and the Gaming Act, 1998.

Following the enactment of the “LOGA”, the LGA became fully functional in 2004, taking over the regulatory roles that used to be performed by the Public Lotto Department, which fell under the Public Service structure. As an independent regulatory body for both terrestrial and remote gaming activities, responsible for the governance and control of all gaming activities in and from Malta including Amusement Machines, Casinos, Commercial Bingo Halls, Gaming Halls, Commercial Communication games, the National lottery, Non-Profit games and Remote Gaming, the LGA grew in capacity, scope and regulatory experience, whereby it is regarded as one of the most serious Gaming Regulatory Bodies in Europe, and is the ‘veteran’ regulator in the EU in the field of on-line gambling as it was the first independent regulatory body to regulate online gaming in the EU in 2004.

Since the enactment of the LOGA, 2001 the LGA established the following mission statement:

"To regulate competently the various sectors of the lotteries and gaming industry that fall under the Authority by ensuring gaming is fair and transparent to the players, preventing crime, corruption and money laundering and by protecting minor and vulnerable players."

Given the continuous changes in the regulatory environment, the LGA refreshed its mission statement in 2010 as follows:

“To promote excellence by ensuring the legal and fair regulation of the gaming industry”

The all-encompassing refreshed mission statement is targeted at being gaming sector neutral, determining the LGA’s local and international standing, whilst acting as a continuation of the internal vision of the organisation.

The LGA’s mission is supported through its ethos based on the following three cardinal pillars:

- “1. That gaming is fair and transparent to the players;
2. Preventing crime, corruption and money laundering; and
3. Protecting minor and vulnerable players.”

The mandatory functions of the Authority are listed in Article 11 of LOGA. These comprise:

- (a) to issue a National Lottery licence and licences to operate other games and to supervise the operation thereof;
- (b) to issue permits to sellers of games forming part of the National Lottery;
- (c) to inquire into the suitability of licensees and the main suppliers thereof, and to ensure that anyone involved is fit and proper persons to carry out their functions relative to such games;
- (d) to ensure that licensees publish the rules of the authorised games operated by them in terms of their licence in such manner as may be deemed appropriate by the Authority;
- (e) to use all powers vested in it by this or any other law to ensure that games and gaming are kept free from criminal activity, and to prevent, detect and ensure the prosecution of any offence against this Act;

(f) to ensure that authorised games are operated and advertised fairly and in a responsible manner and in accordance with the law;

(g) to regulate by licence the manufacture, assembly, repair, service, placing on the market, distribution, supply, sale, lease, transfer, making available for use, hosting and operation of relevant gaming devices, and to ensure that they are secure and satisfactory for the use for which they are intended;

(h) to supervise, attend and validate the draws of the National Lottery and of such other authorised games as it deems necessary;

(i) to receive and investigate complaints by consumers relating to games;

(j) to advise the Minister on new developments, needs and risks in gaming and to make such proposals as may be deemed necessary or expedient to respond thereto;

(k) to advise the Minister on the making of regulations;

(l) to issue directives it is authorised to issue in terms of this Act or of any other law or of regulations made there under;

(m) to perform any other function as may from time to time be assigned to it by this Act or any other law or by regulations made there under.

Apart from the role as defined in the Maltese Gaming Legislative Framework, the LGA is also designated as a 'supervisory authority' under the Prevention of Money Laundering and Funding of Terrorism Act, whereby as a supervisory authority, it assists the national competent authority on the Prevention of Money Laundering.

In 2010, the LGA redesigned its structure comprising of three main divisions; (i) the Regulatory Division which manages and controls all regulatory compliance processes, including both pre licensing and post licensing processes, (ii) an Enforcement Directorate, which manages all aspects which require enforcement measures and (iii) a Corporate Affairs Division which includes all the support functions required by the other two divisions (including Legal and EU Affairs, Strategy, Human Resources, Finance and IT). The structure was created to ensure appropriate corporate governance. Corporate Governance falls under the responsibility of the LGA Board, which is composed of a non- Executive Chairman and four non- Executive Board Members. For corporate governance purposes, the Board is supported by an Internal Audit function, whilst the executive management of the Authority falls under the responsibility of the Chief Executive Officer.

Scope of action of the LGA across the online Gambling Services

Remote Gaming in Malta is regulated through the RGR. In order to provide remote gaming services in or from Malta, one needs to obtain a licence covering the specific gaming operations. Licensees are to operate in compliance with the LOGA and the regulations as well as the anti-money laundering legislation, electronic commerce legislation, the Data Protection Act and any other relevant laws.

In fact Regulation 3 of the Regulations states:

No person shall operate or promote or sell or abet remote gaming in or from Malta unless such person is in possession of a valid licence of the relevant class, as set down in the First Schedule, issued by the Authority or is in possession of an equivalent authorisation by the

government or competent authority of an EEA Member State, or any other jurisdiction approved by the Authority. Any person who acts in breach of the provisions of this regulation shall be guilty of an offence against the Act:

Provided that the Authority may impose such proportionate requirements and conditions, in conformity with European Union law, as it may deem necessary in fulfilment of its functions under the Act, or as the Minister may direct the Authority by virtue of article 12 of the Act (Article 12. (1) The Minister may in relation to matters that appear to him to affect the public interest, from time to time give to the Authority directions in writing of a general character, not inconsistent with the provisions of this Act, on the policy to be followed in the carrying out of the functions vested in the Authority by or under this Act, and the Authority shall, as soon as may be, give effect to all such directions.(2) The Authority shall afford to the Minister facilities for obtaining information with respect to its property and activities and furnish him with returns, accounts and other information with respect thereto, and afford to him facilities for the verification of information furnished, in such manner and at such times as he may reasonably require), in respect of games authorised under any law enacted by a Member State of the European Union or a Member State of the European Economic Area or any other jurisdiction or territory approved by the Authority: Provided further that such requirements and conditions shall be compatible with international obligations.

As per Regulation 3 of the First Schedule of the Remote Gaming Regulations, an established body corporate may apply for either or all of the following licences:

Class 1 Remote Gaming Licence shall be a remote gaming licence.

(eg. - casino type games, online lotteries) whereby operators manage their own risk on repetitive games.

It is also possible to have a Class 1 on 4 licence whereby the Class 1 licensee operates its games on the software and in certain cases through the equipment of a Class 4 licensee;

(b) Class 2 Remote Gaming Licence shall be a remote betting office licence.

(eg. - fixed-odds betting) whereby operators manage their own risk on events based on a matchbook;

(c) Class 3 Remote Gaming Licence shall be a licence to promote and, or abet remote gaming from Malta.

(eg. - poker networks, peer-to-peer (P2P) gaming, game portals) whereby operators take a commission from promoting and/or abetting games.

It is also possible to have a Class 3 on 4 licence whereby the operator uses a licenced Class 4 as its platform;

(d) Class 4 Remote Gaming Licence shall be a licence to host and manage remote gaming operators, excluding the licensee himself.

Here software vendors provide management and hosting facilities on their platform. In essence this is a business to business (B2B) gaming licence.

The Maltese regulatory regime does not discriminate against operators licensed in other EU/ EEA Member States. As provided for under Regulation 3, the LGA considers licences from EU or EEA countries as valid. Therefore an operator which is licensed in another EU/ EEA

country and wants to offer its remote gaming services to Maltese residents does not need to apply for a licence with the LGA.

An application for a remote gaming license is made in writing and is to be received by the Authority. The LGA has issued various forms which can be found on its website (<http://www.lga.org.mt/lga/content.aspx?id=85804>)

Regulation 5 lists the information to be included. This is:

- i. personal background information;
- ii. financial information;
- iii. participation in legal activities, including but not limited to, any interest or equity in any other commercial activity;
- iv. criminal record information;
- v. information concerning all pecuniary, equity and other interests in the applicant; and
- vi. any other information required by the Authority, for every director, key official and chief executive officer of the applicant and for every shareholder with five per centum or more ownership of, or controlling interest in the applicant:

Provided that the Authority may, at its sole discretion, require that all beneficial owners of shares in the applicant provide the information herein mentioned.

Moreover, the Authority will not issue or renew a licence unless it is reasonably satisfied that the persons involved in the applicant company are fit and proper persons. In defining the term fit and proper Regulation 8 states that the Authority will have regard to:

- a. the character of the persons vested with executive powers in the applicant, and the business reputation of such persons;
- b. the current financial position, financial background and business reputation of the applicant's promoters, shareholders and directors;
- c. whether the applicant has the appropriate business ability to conduct remote gaming successfully;
- d. whether the applicant has, or is able to obtain, appropriate resources and is able to maintain minimum required reserves as may be established by the Authority in order to ensure that players shall have winnings paid and deposits returned;
- e. the commitment of the applicant to maintain a physical presence in Malta;
- f. whether the applicant is, in the Authority's opinion, untainted with illegality;
- g. whether the applicant has followed policies and will take affirmative steps to prevent money laundering and other suspicious transactions; and
- h. whether the applicant has the capacity and the internal control structures to enable it to comply with the policies and directives which the Authority deems appropriate.

The application process is divided into three (3) stages. These being:

i) fit and proper and business plan review - the Authority:

- analyses all the information related to the persons involved in the financing and management of the applicant;
- verifies the business viability of the operation;
- carries out probity investigations with national and international regulatory bodies and law enforcement agencies;
- submits the business plan to a financial analysis;

ii) business and technical ability assessment - the Authority examines and reviews the instruments required to conduct the business, whereby, amongst other things, an examination is carried out of the:

- incorporation documents;
- games;
- business processes related to conducting the remote games;
- rules, terms, conditions and procedures of the games;
- application architecture and system architecture of the gaming and control systems.

and

iii) compliance systems audit - this takes place with the commencement of operations, whereby the licensee is subject to a further Systems Audit of its operation. Systems Audits are performed by LGA approved independent certifiers.

In granting a licence the Authority also has the power, under Regulation 9, to subject such licence to conditions it may deem appropriate, it can also vary or revoke such condition or impose new ones. Conditions imposed may be related to, inter alia:

- (a) the proper operation of interactive games;
- (b) the protection of players;
- (c) the prevention of money laundering;
- (d) exigencies of public interest.

The Authority may also, order the suspension or cancellation of a licence on various grounds listed under Regulation 13, which reads:

- (a) any person who has an interest in the licensee, or any key official in relation to the licence is convicted in any country or territory of an offence which is punishable in that country or territory by imprisonment;
- (b) the licensee has failed without reasonable cause being shown to comply with any material term or condition of the remote gaming licence;

- (c) the licensee has failed to discharge financial commitments for the licence holder's operations or the Authority has reason to believe that such failure is imminent;
- (d) the licence holder is insolvent or is being wound up;
- (e) the licence holder applies for an order, or is compelled by any means or for any reason, to discontinue or to wind up its operations;
- (f) the remote gaming licence was obtained by a materially false or misleading representation or in some other improper way;
- (g) the licence holder is in breach of the laws or regulations at any time in force for the prevention of money laundering;
- (h) the licence holder has failed to meet commitments to players;
- (i) the licence holder has failed to pay in a timely manner all gaming or betting taxes due to the Authority;
- (j) the Authority, in its sole discretion, has determined that there is material and sufficient reason for suspending or revoking the licence;
- (k) the Authority reasonably deems it necessary in the national interest to cancel or suspend a licence; and
- (l) the Authority is reasonably satisfied that the licensee presents a danger to the reputation of gaming in Malta.

Once an applicant fulfills all the requirements of the application process, such body corporate is granted a five-year license as per Regulation 7 of the RGR. In the presence of the licensee's key official, an LGA designated official checks that the gaming system and control system is in accordance to the technical documentation submitted during the licensing application process. All hardware equipment is then sealed and the company can commence operations from Malta. At this point, the LGA triggers its post-licensing monitoring mechanism and systems over the activities of such licensee.

The LGA has developed a suite of applications to actively monitor the gaming operations of its licensees known as the Remote Gaming Monitoring Systems (RGMS). Once a gaming operator goes live, its website parameters such as IP addresses, TCP ports and certain online content are recorded in the Authority's RGMS. The system then performs continuous real time monitoring functions on the operations of the license. It may also detect DDOS attacks and other extraordinary network traffic conditions using packet-type classification and ensures that the website is actually intended for public use at all times.

The system is also capable of collecting event data to detect system downtimes and changes to particular online content, such as changes in players' Terms and Conditions and Game Rules. It also scans websites; detect updates content such as new games, new languages, etc. All the information obtained from this system is then checked against incident reports and corroborated with other data submitted in by licensees.

The Authority ensures that operators are financially stable and solvent at all times. In the interest of players, the Authority performs monthly checks to ensure that the amounts declared by licensees as 'player deposits' are actually held in a separate ring fenced bank account and that player winnings are being honoured.



Apart from monthly data, licensees are also required to submit six monthly management accounts and the annual financial audit report. Such reports are analysed to assess the financial stability of the licensee and compared with monthly reporting and the business plan forecast submitted during the licensing application process and other financial information submitted by the licensees.

LGA officials regularly visit Datacentre Server Co-Location Service Providers to check gaming equipment. Their duty is to report any broken seals or new equipment, which has not been vet by the Authority. They also check who had physical access to systems and if any equipment has been removed without prior permission. Such checks are performed wherever such gaming equipment may be hosted. LGA officials also visit the offices of gaming operators to meet with key officials, check the conduct of games and to ensure that all the staff employed by the licensee is approved by the Authority.

The LGA has the vested powers to conduct investigation, through the RGR under Regulation 53:

The Authority may, at its sole discretion, conduct an investigation of a licensee and, or a key official if it is brought to its attention or it has reason to believe that the licensee and, or key official are not conforming to the Act and, or these regulations.

Accordingly, the Authority investigates a number of cases ranging from suspicious transactions to player complaints to non-fairness complaints as well as payment defaults. The Authority is continuously carrying out operators' checks (including but not limited to data extraction processes), on-site audit reviews and in-depth investigations to ensure that the requirements of the regulations are being fulfilled. The Authority also reports to the Executive Police breaches of a criminal nature, such as for instance, conducting gaming without holding a valid license from the LGA, an authority from the EEA or any approved jurisdiction, or for instance in cases of misappropriation of player funds. The LOGA under Article 74(3) gives the powers to the LGA to jointly prosecute with the Executive Police in the National Courts. This Article provides that:

In any proceedings in relation to offences against the Act or regulations made there under, it shall be lawful for the Authority or any officer or other person delegated by the Authority, to examine or cross-examine witnesses, produce evidence, make submissions in support of the charge and generally to conduct the prosecution on behalf of the police, and the sworn statement of the officer or other person delegated by the Authority that he has been duly delegated for that purpose shall be conclusive evidence of that fact.

Moreover, being a designated 'supervisory authority' under the Prevention of Money Laundering Act, the LGA is also responsible to report to the competent authority (the Financial Intelligence Analysis Unit) any suspicious transactions that may involve money laundering or the funding or terrorism. The LGA and the Financial Intelligence Analysis Unit have a Memorandum of Understanding (MoU) in place for mutual assistance and collaboration on matters pertaining to the prevention of Money Laundering.

Any identified breaches of its licensees to the Data Protection Act, are also reported to the Data Protection Commissioner for investigations.

The LGA understands the importance of regulating effectively. It has established well-defined procedures for the licensees to follow coupled with the implementation of its internal control mechanism to enable the constant monitoring of its licensees' gaming activity. This is a critical function within its Regulatory Framework so as to provide assurance that gaming is

kept free from crime and corruption, protects vulnerable players from excessive gaming and keeps minors out of gambling.

**(47) Is there a national register of licensed operators of gambling services? If so, is it publicly accessible? Who is responsible for keeping it up to date?**

Yes LGA keeps a register of its licensed operators. This register is divided into various categories as follows:

Licensed operators: Class 1

Licensed operators: Class 1 on 4

Licensed operators: Class 2

Licensed operators: Class 2 on 4

Licensed operators: Class 3

Licensed operators: Class 3 on 4

Licensed operators: Class 4

Cancelled Licenses

Suspended License

Terminated Licenses

This register has been publicly available since 2004. It is the LGA who publishes it on its website and keeps it up to date (<http://www.lga.org.mt/lga/content.aspx?id=86949>).

**(48) Which forms of cross-border administrative cooperation are you aware of in the domain of gambling and which specific issues are covered?**

Two multilateral gambling regulatory organisations can be identified in which Member States, including Malta, participate: The Gaming Regulators European Forum (GREF) and the International Association of Gambling Regulators (IAGR). IAGR is a world-wide organization with members from the EU (Austria, Belgium, Bulgaria, Denmark, Finland, Hungary, Italy, Latvia, Lithuania, Malta, the Netherlands, Poland, Portugal, Slovenia, Spain, Sweden, the UK). IAGR has participants also from Africa (South Africa), America (USA, Canada, Antigua and Barbuda, the Bahamas, Jamaica, St. Lucia, US Virgin Islands, Peru), and Asia (Macau, Singapore), Australia and New Zealand. IAGR's eGambling working group has been very successful in sharing experiences and good practice.

The only multilateral organisation that concentrates on European countries is GREF. GREF was founded by Portugal, Denmark, France, the UK, the Netherlands and Spain. Most Member States are active members of GREF except for Austria, Cyprus, Ireland, Greece, Italy and Luxembourg. Member States are represented by the authorities responsible for the control of the gambling market.

GREF's main importance lies in providing a forum for the competent authorities to meet both at formal and informal level, exchange information and views and learn from the different

approaches of the participating countries (best practices) regarding not only land-based but also remote gambling.

The members of GREF have annual plenary sessions and more regular meetings in four working groups. On the sessions each country presents a report of its activities held during the preceding year. The working groups are dealing with technical issues, information and statistics, gambling addiction and e-gambling issues. The working groups regularly present evaluations to the members based on their surveys. The work of GREF is supported by a website where the members can quickly share and exchange information.

Malta supports the enhancement of regulatory cooperation between national regulatory authorities in particular with the aim of acting jointly against the black market, defined as that part of the market consisting of operators not licensed or authorised in an EEA Member State. Coordinated EU enforcement against such operators should lead to an agreed approach as all Member States pursue the same common aim: that is all Member States seem to agree that there is need to take action against operators providing services without an being authorised within the EEA.

Malta believes that the scope of regulatory cooperation must be aimed firstly at facilitating the exercise of the internal market in particular the free movement of cross-border gambling and betting services and the proper application of the principle of non- duplication of requirements and controls within the EU. This would ease administrative burdens across EU Member States, as called for in the Council Conclusions of December 2010.

Malta believes that should there be a set of EU wide minimum standards (e.g. on consumer protection, fraud etc), then Malta believes the scope of regulatory cooperation could be extended to target enforcement of these EU standards within the EU. Until an EU set of standards has been agreed, there cannot be enforcement actions at an EU level, as this cannot be based on national rules which would vary nature across the 27 Member States.

Malta believes the assistance of the Commission would be instrumental as for instance creating a structure, possibly through the establishment of a Commission expert group composed of national regulatory authorities, to assist this cooperation with a pre-agreed specific mandate. This would ensure focussed formal discussions (agendas); with appropriate follow-ups on agreed implemented programmes. Subjects for discussion and cooperation could include: common fight against the black market; practical implementation on agreed EU consumer protection standards; coordination of awareness and educational campaigns etc.

**(49) Are you aware of enhanced cooperation, educational programmes or early warning systems as described in the Green Paper that are aimed at strengthening integrity in sport and/or increase awareness among other stakeholders?**

Malta is aware of the early warning system implemented by leading European online gaming operators within the European Sports Security Association (ESSA) (Irregular betting patterns or possible insider betting from within each sport is monitored and any suspicious betting activity is immediately notified to the regulator with the aim of preventing game manipulation), in particular sports book operators, whereby any irregular betting patterns or possible insider betting from within each sport is monitored and any suspicious betting activity is alerted and then immediately notified to the regulator with the aim of preventing game manipulation on a given event. Malta encourages its licensees to collaborate with

sporting bodies on sports integrity issues. In fact more than half of the members of ESSA are Malta licensees.

**(50) Are any of the methods mentioned in the Green Paper, or any other technical means, applied at national level to limit access to on-line gambling services or to restrict payment services? Are you aware of any cross-border initiative(s) aimed at enforcing such methods? How do you assess their effectiveness in the field of on-line gambling?**

As mentioned in the Green Paper, in order to restrict access to online gambling services, some Member States impose payment and Internet Protocol blocking measures.

Malta has to date adopted an informative approach of encouraging users to play on websites of EEA licensed operators as opposed to websites of illegal operators providing services without a licence from an EEA Member State.

Other Member States are, however, making use of these enforcement measures.

In the first place Malta does not agree with the introduction of such blocking mechanisms in relation to EEA licensed online gaming service providers offering services on the basis of the EU Treaties. Blocking measures should only be used for very specific reasons, such as blocking of child pornography sites, and in any case through relevant court orders.

In particular, Malta does not agree with website blocking in relation to EEA licensed online gaming service providers since the appropriateness of such measures, and their proportionality, (as required by the Court of Justice of the EU) is dependent on the nature of the policy in each Member State and, therefore, needs to be assessed on a State by State basis. It follows that national law which provides for blocking of internet access to websites of information service providers and online gaming providers - especially when they operate with a valid authorisation or licence issued by a Member State of the EEA, could amount to a disproportionate restriction to the freedom to provide services and thus would be incompatible with EU law.

Malta also believes that website blocking, has proven to be ineffective from a technical perspective, and that it is contrary to the spirit of the Information Society. In this respect Malta would refer to the reporting article of Gambling Compliance highlighting the Norwegian Gaming Authority's preliminary evaluation of the ineffectiveness of their payment blocking system whereby it resulted that 52% of players still managed to circumvent this (<http://www.gamblingcompliance.com/node/46229>). Furthermore in France, a selective website ban is not proving easy to apply in practice due to French ISPs' resistance to such a system which is costly for them to run. Finally in Belgium, similar resistance was encountered by banks who refused to participate in tracking "illegal" online gaming websites.

As mentioned above, Malta agrees with the Commission Legal Services' view, as expounded in the legislative discussions on the review of the Telecommunications regulatory framework, that measures as intrusive as blocking measures should only be imposed in accordance with the European Convention of Human Rights (ECHR) and the EU Charter of Fundamental Rights.

In this respect, the case law of the ECHR has consistently held that Article 10 ECHR (reflected in Article 11 of the EU Charter) guarantees not only the right to impart information but also the right to receive information. In a judgment of 10 March 2009 (Times Newspapers LTD (NOS. 1 and 2) v The United Kingdom), the ECHR made it clear that the Internet, given

its important role in enhancing the public's access to news and facilitating the dissemination of information generally, falls within the protection afforded by Article 10 of the Convention. It follows that every restriction of the right to impart or receive information (which would include the blocking of internet access) is potentially a restriction of Article 10 of the Convention.

Admittedly, Article 10 does not grant an absolute right. In fact as set out in paragraph 2 of the said article (also in paragraph 2 of Article 11 of the Charter), the right can be subject to formalities, conditions and restrictions (note also that the first paragraph of Article 10 specifically condones licensing regimes). However, any restriction of the rights granted under Article 10 needs to be prescribed by law, pursue a legitimate aim and be necessary in a democratic society (which necessity-test includes a proportionality aspect as well).

This means that any power of national regulatory authorities (NRAs) to restrict internet access must be conferred by law and must be framed and conditioned as to how and the way in which the NRAs will exercise such power, and will have to comply with the other conditions referred to above.

It should also be noted that the EU is placing considerable efforts in order to promote the use of internet and internet services within the European Commission's Digital Agenda. Blocking of gaming sites without any doubt is both in spirit and in practice contrary to the EU's philosophy and targets of being the true digital society and economy.

Also of relevance is Directive 2009/140/EC of European Parliament and Council of 25 November 2009 which amended Directive 2002/21/EC on a common regulatory framework for electronic communications which already specifically tackles measures restricting access to the internet. Article 1 of this 2009 Directive amended the telecoms Framework Directive (2002/21) by, amongst others, adding a new paragraph 3a to Article 1 of the latter, as follows:

"3a. Measures taken by Member States regarding end-users' access to, or use of, services and applications through electronic communications networks shall respect the fundamental rights and freedoms of natural persons, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and general principles of Community law.

Any of these measures regarding end-users' access to, or use of, services and applications through electronic communications networks liable to restrict those fundamental rights or freedoms may only be imposed if they are appropriate, proportionate and necessary within a democratic society, and their implementation shall be subject to adequate procedural safeguards in conformity with the European Convention for the Protection of Human Rights and Fundamental Freedoms and with general principles of Community law, including effective judicial protection and due process. Accordingly, these measures may only be taken with due respect for the principle of the presumption of innocence and the right to privacy. A prior, fair and impartial procedure shall be guaranteed, including the right to be heard of the person or persons concerned, subject to the need for appropriate conditions and procedural arrangements in duly substantiated cases of urgency in conformity with the European Convention for the Protection of Human Rights and Fundamental Freedoms. The right to effective and timely judicial review shall be guaranteed."

Recital 4 explains what the aim of the above is:

"Recognising that the Internet is essential for education and for the practical exercise of freedom of expression and access to information, any restriction imposed on the exercise of these fundamental rights should be in accordance with the European Convention for the

Protection of Human Rights and Fundamental Freedoms. Concerning these issues, the Commission should undertake a wide public consultation."

Malta would like to remind the Commission that during the negotiations on the Telecommunications Review, even the European Parliament opposed the blanket possibility for Member State or their national authorities to restrict access to the internet and insisted that any such measures must follow a Court Judgment/order. This led to conciliation procedure whereby the originally drafted Article 1(3a) above was re-worded. During these negotiations, the possibility of restricting access was particularly important for France who imposed these measures for cases of illegal downloading of songs/infringement of copyright.

In short, if Member States choose to adopt an approach whereby their national authority is empowered to restrict access to internet, Malta submits they would still be obliged to respect the conditions set out in the EU Charter and ECHR cited above for example presumption of innocence, right to privacy, guarantee to a prior, fair and impartial procedure with right to be heard, effective judicial review of NRA actions etc.

Furthermore, the Attorney General of the CJEU in its Opinion in the Scarlet/Sabam (Case C-70/10) held that the Belgian ISP Scarlet should not have to filter copyright infringing traffic from its service because to do so would invade users' privacy. Scarlet had been ordered by a Belgian Court to filter traffic that infringed copyrights. The AG, Pedro Cruz Villalon said that such a system would violate rights guaranteed under EU law. He stated that 'the installation of the filtering and blocking system is a restriction on the right to respect for privacy and communications and the right to protection of personal data, both of which are rights protected under the Charter of Fundamental Rights.'

He continued by stating that these rights listed under the Charter of Fundamental Rights can be restricted but only in line with national law and even these laws must meet certain standards. The AG continued by stating that the demands made by the Belgian Court would be extensive and would lead to the blocking of files that no Court had said definitely infringed copyright.

'The Court order would instead apply in abstracto and as a preventive measure which means that a finding would not first have been made that there had been an actual infringement of an intellectual property right or even that an imminent infringement was likely.' He also added that the measure would apply and affect many in that customers of the ISP would be prevented from transmitting material to others who were not.

The AG found that neither the filtering system (which was intended to be applied in a systematic, universal, permanent and perpetual basis), nor the blocking mechanism, which can be activated without any provision being made for the persons affected to challenge it or object to it are coupled with adequate safeguards.

The outcome of this case could also have far reaching effects on the Italian authorities' filtering of foreign online gambling websites in that if such practices are struck down as illegal, Italy would also not be able to impose on its internet providers to filter such internet content.

The E-Commerce Directive, in fact in article 15, states that ISPs are generally not responsible for the activity of customers and that Member States must not put ISPs under any obligation to police illegal activity on its service.

With regard to payment blocking and liability regimes for ISPs as mentioned in the Green Paper:

Malta submits that if a blocking system is applied as was attempted in Belgium in the above mentioned case, this would certainly not fall within the ambits of an efficient blocking system. Moreover, according to article 15 of the Directive, Internet Service Providers are not responsible for the blocking of such content.

The article in question in fact provides that Member States shall not impose a general obligation to monitor the information which they transmit or a general obligation to actively to seek facts or circumstances indicating illegal activity.

One of the inherent problems with filtering as already stated by the AG in the Scarlet/Sabam Case is that of over-blocking. Current technology is not able to accurately identify and block specific internet content without including some content which poses no threat or reason to block. Under-blocking is another flaw which poses the opposite problem in that even if a filtering mechanism is in place, certain content slips through the cracks. 'Blunt filtering methods such as IP blocking can knock out large swaths of acceptable websites simply because they are hosted on the same IP address as a site with restricted content.'

**(51) What are your views on the relative merits [in terms of suitability and efficiency] of the methods mentioned in the Green Paper as well as any other technical means to limit access to gambling services or payment services?**

Malta considers that there are not merits to adopting these intrusive enforcement measures. With particular reference to Payment Blocking systems Malta submits that by blocking mainstream forms of payment (through the 7995 transaction code) this would create the incentive to offer alternative forms of payment to cater for the unwavering demand, such as by recoding financial transactions (to avoid having to go through 7995) which in turn leads to fines and penalties for payment gateways involved since such practices are at best non-transparent. Such systems force players to resort to non-transparent /grey means to cater for the demand out there - which does not waver due to the existence of these enforcement measures - notably cash collection, u-cash, paysafe, ticketsurf. These payment methods are equivalent to anonymous cash payments in the online world and as such are much more dangerous and ensure no consumer protection whatsoever. For example in the United States, vouchers are sold online to use for on-line gaming and on-line game sharing is developing (similar to x-box). These vouchers are sold via affiliates who then accept players from United States with the use of these vouchers. Malta notes that there are various schemes in place to work around the blocking.

#### **Other comments on issues raised in section 2.4**

#### **Other comments on issues raised in the Green Paper**