

European Gaming and Betting Association

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Subject: Fi2020/02404/OU - Need for re-notification: TRIS 2020/264/S

Dear Sir/Madam,

We, the European Gaming and Betting Association (EGBA), the association representing the leading online cross-border licensed gaming and betting operators in the European Union ('EU'), would like to bring forward our considerations on the recent changes to the Draft Ordinance on temporary responsible gambling measures in connection with the spread of the COVID-19 disease ('Draft Ordinance'), notified to the European Commission ('EC') under TRIS number 2020/264/S, pursuant to Directive (EU) 2015/1535 ('Directive'). These changes affect materially the scope of the Draft Ordinance (as originally notified) and necessitate a re-notification.

Further, as the amended Draft Ordinance is now undergoing a second public consultation, to which EGBA is currently responding, it would seem that the Swedish Government also considers that the changes are sufficiently substantial to warrant a second exchange of views with the industry.

The need to re-notify the proposed Draft Ordinance

The proposed Draft Ordinance clearly requires formal re-notification to the European Commission for the reasons stated below.

Article 5(1)(3) of Directive 2015/1535 states:

*Member States shall communicate the draft again under the above conditions if they make changes to the draft **that have the effect of significantly altering its scope**, shortening the timetable originally envisaged for implementation, adding specifications or requirements, or **making the latter more restrictive**. [emphasis added]*

Article 5(1)(3) is therefore engaged because the changes significantly alter the scope of the proposed Draft Ordinance as the application of the law changes.

Changing the scope of the proposed Draft Ordinance to apply only to online casino and not to betting fulfils the criteria of Article 5(1)(3). These changes have a significant impact on the proposal, its effect on channelling and the practical implementation and application of the proposed measures. There is no doubt that the changes introduced by the Swedish legislator to the Draft Ordinance after it had been formally notified to the European Commission fall within the category of significant changes in Article 5(1)(3) of Directive 2015/1535.

We therefore strongly contend that Sweden must comply with its obligation to re-notify to the European Commission the proposed Draft Ordinance with the changes proposed on 22 May 2020 otherwise the Swedish State will be in breach of Article 5(1)(3) of Directive 2015/1535.

The result of the failure to notify is confirmed by numerous rulings of the European Court of Justice, such as it is settled case law of the CJEU that measures falling within the scope of the Notification Directive which have not been notified at the draft stage cannot be enforced by the respective Member State as they cannot be held applicable to individuals (see to this extent CJEU of 30 April 1996, C-194/94, *CIA Security*). This is also the case if a given piece of legislation has been notified but a given Member State failed to re-notify despite its obligation to do so.

It should be noted that further consideration of whether the effect of the draft is more or less restrictive is not required because the changes to the Draft Ordinance already fulfil one of the requirements of Article 5(1)(3) and thus such an assessment is immaterial. The Notification Directive does not, in fact specify, or require the Member State to only notify changes to the scope, which are more restrictive, but requires that any changes mentioned under the situations of Article 5(1)(3) necessitate the need for re-notification. Thus, even if the scope of the measures has been narrowed, rather than expanded a notification is still strictly required even if the Draft Ordinance *prima facie* appears less restrictive than the previous version of the law. In fact, it must be underlined, that the effect on channelling remains the same in this case.

Therefore, it is critical that the recently proposed changes to the Draft Ordinance are re-notified.

Effects on channelling

EGBA invites the Swedish authorities to re-examine our arguments that demonstrate the severe effect the Draft Ordinance will have on channelling, as outlined in our submission to the previous national consultation of 6 May 2020.

Since then, new information has come to light that further supports our position. The justification for the proposed restrictions is not evidence-led – online gambling in Sweden has, in fact, decreased.

Based on the available data, there has been no increase in online gambling in European countries – including Sweden – since the coronavirus lockdowns. On the contrary, online gambling has decreased in Sweden by 6% and it has also decreased elsewhere as reported by, for example, the Belgian, Danish and UK regulators. Rather than one-size-fits-all restrictions, which will have no effect on the majority of customers and jeopardise consumer protection for those they seek to protect, EGBA supports targeted measures, including tailored interventions, to protect those at risk of problem gambling at this time. We invite you to read the EGBA statement that contains more information [here](#).

Finally, as to the substance of the proposed changes, EGBA is aware of the fact that the changes to the Draft Ordinance will lead to the Swedish gambling market being carved up in two parts – one part is where the State controlled gambling operations (such as AB Trav och Galopp who have profited significantly from the COVID 19 crisis) are effectively ring-fenced from the temporary measures, and the other part is where commercial licensed operators will have to implement proposed restrictions, which will in turn, again, will impact on the channeling in Sweden. EGBA considers this to be discriminatory and baseless, as all evidence presented both by the private industry as well as the regulator points to a conclusion different from the one that has been put forward in this consultation.

Overall, EGBA considers that the draft Ordinance contains unnecessary and discriminatory restrictions that entail the severe risk of channelling the demand of Swedish players to the unregulated offer. Moreover, the changes in the Draft Ordinance clearly require its re-notification to the European Commission in order to ensure its legality.

We thank you in advance for your consideration of our contribution.

Yours sincerely,



Maarten Haijer

Secretary General
European Gaming and Betting Association (EGBA)