

THE HELLENIC REPUBLIC**Response to information request from the Commission****SA.33732 – Taxation on Online Gambling in the Greek Gaming Act**

By informal letter of 17 January 2012, the European Commission (the *Commission*) requested further information from the Hellenic Republic (the *HR*) in relation to certain issues relating to (i) games offered in Greece, (ii) the ‘Stoihima’ game and (iii) Deloitte’s valuation of the extension of OPAP’s exclusive right.

Please find below the HR’s response on this information request.

I. Games offered

1. *Are the 13 games provided by OPAP (by any means and under exclusive rights) and the other games open to competition (Gaming Act 4002/2011) in a comparable situation in law and in fact?*

2. *In particular, please specify the extent to which these games may be similar, comparable, equivalent or substitutable from the consumer’s perspective. If you consider that the games offered by OPAP and those to be offered by on-line licensed operators are not comparable, please provide adequate explanations.*

On 18 January the Commission expanded the question informally as follows: *Please also provide the same information about the additional games offered by OPAP as per their website and explain (i) whether these games are under the monopoly and/or will be opened to competition and (ii) whether they are factually and legally comparable to the “13” games.*

1. Introduction

Since the Commission’s questions no. 1 and 2 of the informal letter of 17 January 2012 as well as the separate informal question of 18 January 2012 all concern the games offered by OPAP and their potential similarities with games offered by other operators, the HR will address these questions jointly.

Accordingly, below is (i) an overview of the games offered by OPAP; (ii) an overview of games potentially open to competition under Law 4002/2011; and (iii) the HR’s assessment of the question whether OPAP’s 13 games (or any of them) “*may be similar, comparable, equivalent or substitutable*” (or legally and factually comparable) in relation to any other (online) games of chance from the consumer’s perspective.

2. Overview of games offered by OPAP

OPAP’s exclusive right under the Concession Agreement dated 15 December 2000 (the *Concession Agreement*) comprises the 13 games “Tzoker“, “Lotto”, “Proto”, “Propo”,

“Propogoal”, “Extra 5” (ex. “Arithmolaxeio 5 Apo 35”), “Kino”, “Super 3”, “Super 4”, “Bingo Lotto”, “Prognostika Agonon Basket”, “Prognostika Agonon Omadikon Athlimaton” and “Stoihima (fixed or non fixed pay out)” (the *Exclusive Right*).

Nine (9) out of 13 games mentioned above are currently operational. These are “Tzoker“, “Lotto”, “Proto”, “Propo”, “Propogoal”, “Extra 5” (ex. “Arithmolaxeio 5 Apo 35”), “Kino”, “Super 3”. The other four (4) games, i.e. “Super 4”, “Bingo Lotto”, “Prognostika Agonon Basket” and “Prognostika Agonon Omadikon Athlimaton” are however not currently offered by OPAP, and it is still open if and when any of these games will be launched.

As noted by the Commission, certain games are advertised on OPAP’s website under other names than as listed above. These are the three “*Monitor games*” called “Races”, “Powerspin” and “Bowling” as well as the 5 “*Go Lucky*” games “Balloons”, “Goal”, “Crazy Bingo”, “Flipper Drop” and “Ducklings”. Both “Monitor” and “Go Lucky” games are variations of “Stoihima”. There are currently three variations of betting games offered under the licence to conduct “*Stoihima (fixed or non fixed pay out)*”: (i) “Pame Stoihima” (betting on sports events); (ii) “Monitor games” (betting on *real or virtual* events shown on monitors in OPAP’s agencies); and (iii) “Go Lucky” (betting on *virtual* events shown on monitors in OPAP’s agencies).

Please find attached (as **Annex 1** hereto) a table which contains a factual description of each of the 13 games listed above.

3. Overview of games open to competition under Law 4002/2011

There is currently no exhaustive list of the games that may be licensed and open to competition (online) under Law 4002/2011. In accordance with Article 45 of said Law, the HR has the discretion to grant licences for online games of chance, but at this point in time, the HR has no complete strategy for which games shall be conducted outside the monopoly area and in which way the licensing of online games shall take place. Consequently, only preliminary observations can be made with respect to the games of chance which may be presumed to be made available for licensing under Law 4002/2011.

Apart from ‘Stoihima’, which shall be released for online competition in the period between 13 October 2020 and 12 October 2030 (the *Extension Period*), according to the Addendum of 12 December 2011 between the HR and OPAP to the Concession Agreement (the *Addendum*) none of the games which are subject to OPAP’s Exclusive Right shall be licensed to third party providers.

Considering the games covered by OPAP’s Exclusive Right as set out above, and without prejudice to the HR’s discretion as regards the scope and timing of the online licensing process under Law 4002/2011, games which may be licensed to third party online operators under the said Law may indicatively include:

- online “*Stoihima (fixed or non fixed pay out)*” as of 13 October 2020 (for a description of the different variations of the ‘Stoihima’ game, please refer to the table enclosed as Annex 1); and
- online **live casino games**, including e.g. online (live) poker tournaments, which are not currently offered by OPAP.

It should be noted that, according to the Ministerial Decision no 010010/2011 (Government Gazette B' 2503) of the Minister of Finance granting OPAP the VLT licence (the *VLT Licence*) and the respective agreement between the HR and OPAP of 4 November 2011 (the *VLT Agreement*), casino games whose results are generated (only) by a random number generator (*RNG*) shall **not** be licensed for online conduct by any operator. This limitation is intended to secure the effectiveness of OPAP’s VLT monopoly, and shall apply for the duration of the exclusive VLT Licence granted to OPAP.

4. Legal and factual comparability

Firstly, as regards *legal* comparability, the HR would like to reiterate that as an undertaking operating as a lawful exclusive licensee in markets which are not open to competition (under the strict regulatory and managerial control of the State), OPAP cannot reasonably be regarded as being in a *legal situation* comparable to that of other undertakings who will operate in liberalised market segments and who will not be subject to the same nature of control as OPAP.

As the Commission is aware, the EFTA Surveillance Authority has previously found that “*based on the special nature and regulation of gaming services*”, the Norwegian gaming monopoly Norsk Tipping AS was not in a factual and legal situation comparable to that of certain competing providers of gaming services.¹ In the HR, as in Norway, gaming services are of a special nature and subject to special regulation, which *inter alia* provides that within the areas covered by monopolies, GGR duties are normally not payable. Instead of GGR duties, OPAP pays significant amounts in consideration for its exclusive rights², and is consequently clearly subject to “*another form of imposition*” (similar to what was the case

¹ EFTA Surveillance Authority decision No. 492/09/COL of 2 December 2009, *Complaint by Norsk Lotteridrift ASA against alleged State aid in favour of Norsk Tipping AS (NORWAY)*.

² As previously mentioned, the consideration payable by OPAP for its Exclusive Right amounts to approximately EUR 323 million for the period up until 12 October 2020, and EUR 375 million as well as 5% of the relevant GGR for the Extension Period.

with Norsk Tipping AS, whose profits were earmarked for sports, cultural, humanitarian and social causes).

Secondly, in the below, the HR will address the legal and *factual* comparability of the relevant games of chance against the background of case law relating to the types of games of chance which are comprised by OPAP's Exclusive Right as well as other games which may be licensed for online competition under Law 4002/2011, that is:

- (i) games that may be characterised as **numerical lottery games** (“Tzoker“, “Lotto”, “Proto”, “Extra 5”, “Kino”, “Super 3”, “Super 4” and “Bingo Lotto”, all exclusive to OPAP offline and online);
- (ii) **betting** (compare “*Stoihima (fixed or non fixed pay out)*”), which – with the exception of mutual horse racing betting (for which the Hellenic Horseracing Company – ODIE – has the exclusive right) – is covered by OPAP's Exclusive Right offline and online up until 12 October 2020 (according to the Addendum), and may thereafter be open for licensing to third parties in the online channel;
- (iii) so called “**mutual games of sport prognostics**“ (“Propo”, “Propogoal”, “Prognostika Agonon Basket” and “Prognostika Agonon Omadikon Athlimaton”, all exclusive to OPAP offline and online); and
- (iii) (online) **live casino games**, none of which are offered by OPAP, and are likely to be eligible for online licensing to third parties from the outset under Law 4002/2011, including e.g. live poker tournaments.³

(a) Numerical lottery games

For a description of the characteristics of OPAP's *numerical lottery games*, please refer to Annex 1. All numerical lottery games currently offered by OPAP (“Tzoker“, “Lotto”, “Proto”, “Extra 5”, “Kino” and “Super 3”) are games of *pure chance*, meaning that no element of skill is required on the part of the player (nor can individual expertise be held to affect the chance of winning to any extent, as opposed to betting and many casino games).

The HR is not aware of any prevalence study dealing with the typical player profiles of Greek gamblers. However, the HR considers it likely that on average, the above types of

³ Provided that the result of the game is not (only) generated by RNG (as mentioned above, the VLT Licence provides that if the result is generated by RNG, the said games may not be offered in the online channel by any operator, including OPAP).

numerical lottery games generally attract older customer groups than sports betting or online casino games.⁴ Moreover, in OPAP's view, customers of OPAP's numerical lottery games are very unlikely to consider these games substitutable by the types of games which may be available for licensing to third parties, such as online betting and casino games respectively.⁵ Placing a bet on e.g. a football match, or participating in an online live poker tournament are clearly very different activities from filling in a "Lotto" ticket. In the HR's opinion, these games are certainly not equivalent (or even similar).

With the exception of "bingo" (which OPAP may, but has not yet, introduce under its "Bingo Lotto" licence), most numerical lottery games such as those comprised by OPAP's Exclusive Right are not widely offered online in Greece. Moreover, on a European level, lottery games such as those offered by OPAP are often operated by state controlled monopolies even where other parts of the gaming markets have been (or are in the process of being) liberalised (this is for instance the case in Germany). It remains to be seen if and to what extent OPAP will offer these games online.

Against this background, there are clearly important factual characteristics that distinguish the numerical lottery games subject to OPAP's Exclusive Right from the games which may be open for licensing to third parties under Law 4002/2011 (see further below).

The HR notes that this distinction between numerical lottery games and other types of games of chance finds support in case law from different fields of competition law. As set out below, this case law indicates that:

- (i) the numerical lottery games offered by OPAP do **not** belong to the same relevant product market as e.g. gaming machines, poker, or betting; and
- (ii) the offline and online provision of said numerical lottery games may belong to one and the same relevant product market.

In the *Lottomatica/GTECH* merger, the Commission ultimately left the definition of the relevant product market open, but noted that its market investigation revealed that players do

⁴ By comparison, it can be noted that according to the 2010 British Gambling Prevalence Survey (section 3.2.1, table 3.1, available at <http://www.gamblingcommission.gov.uk>), the UK National Lottery (which operates numerical lottery games such as 'Lotto', 'Thunderball' and 'EuroMillions') saw its highest participation rates (on an annual basis) in the age groups 35-44, 45-54 and 55-64, while sports betting and casino games alike (offline and online) was most common in age groups 16-24 and 25-34.

⁵ There may be limited substitutability between for example "Lotto" and the "*mutual games of sports prognostics*" offered by OPAP, as set out in section (c) below.

not regard traditional games like ‘Lotto’ as alternatives to *video lottery terminals*.⁶ Moreover, according to the case law of the UK competition authorities, *betting* is a separate activity that is not constrained by other forms of gambling, such as lotteries.⁷ Furthermore, in its opinion of 20 January 2011⁸, the French Competition Authority held that *games of pure chance* (such as numerical lotteries) do not belong to the same relevant product market as games requiring player *expertise* (such as sports betting, betting on horse racing and poker). Finally in this regard, in the case law of the German Federal Cartel Office (the *FCO*), it has been held that the relevant market for lotteries is distinct from betting, casinos and penny arcades (gaming machines).⁹

Consequently, available case law indicates that the numerical lottery games offered by OPAP do **not** belong to the same relevant product market as e.g. video lottery terminals or other gaming machines, poker, sports betting or horse betting.

Although there seems to be limited case law dealing with the distinction between *offline and online lottery games*, it can be mentioned that in its decision in *LRP/Lotto Rheinland Pfalz*, the FCO held that the relevant market for lotteries should not be further segmented by reason of the distribution channel (i.e. physical outlets vis-à-vis the internet etc), nor should each lottery product form a separate product market.¹⁰

It follows from the above that the numerical lottery games covered by OPAP’s Exclusive Right and the types of games which may (given the scope of OPAP’s Exclusive Right, as set out above) be open for licensing to third party operators under Law 4002/2011¹¹ are neither

⁶ Case COMP/M.4114 Lottomatica/GTECH, decision of 19 May 2006 (full text version only available in Italian).

⁷ The Office of Fair Trading’s (*OFT*) decision of 16 April 2008 regarding Ladbrokes Ltd’s acquisition of Eastwood Bookmakers; the OFT’s decision of 27 September 2005 regarding the acquisition by Hilton Group plc through Ladbroke Racing (Reading) Limited of Jack Brown (Bookmaker) Limited; the OFT’s decision of 1 August 2005 regarding the acquisition by William Hill of the licensed betting offices of Stanley Plc; and the Monopolies and Mergers Commission’s report on Ladbroke Group PLC and the Coral betting business (1998, Cm 4030), as well as the other cases referred to in the said decisions.

⁸ Autorité de la Concurrence Avis n 11-A-02 du 20 Janvier 2011 relatif au secteur des jeux d’argent et de hasard en ligne.

⁹ FCO decision of 23 August 2006 in B 10-148/05, *DLTB and federal lottery companies*, paras 172-190 and FCO decision of 29 November 2007 in B 6-158/07, *LRP/Lotto Rheinland Pfalz*, paras 114-120.

¹⁰ FCO decision of 29 November 2007 in B 6-158/07, *LRP/Lotto Rheinland Pfalz*, paras 114-120.

¹¹ See further below as regards ‘Stoihima’ and online live casino games.

“*similar, comparable, equivalent or substitutable from the consumer’s perspective*” nor factually and legally comparable for the purpose of State aid law.

(b) Betting – “Stoihima (fixed or non fixed pay out)”

As further set out in Annex 1, there are currently three variations of betting games offered under the licence to conduct “*Stoihima (fixed or non fixed pay out)*”: (i) “Pame Stoihima” (betting on sports events); (ii) “Monitor games” (betting on *real or virtual* events shown on monitors in OPAP’s agencies); and (iii) “Go Lucky” (betting on *virtual* events shown on monitors in OPAP’s agencies) (together referred to as ‘Stoihima’ below). ‘Stoihima’ is a complex, largely *skill-based* betting game.

By far, the type of bets which accounts for the largest share of all ‘Stoihima’ bets relates to sports events (in particular football betting under “Pame Stoihima”). For example, football bets can relate to the result of a particular match, as well as other “special” occurrences such as e.g. whether a specific striker will be the first to score a goal in a certain match. A player’s level of knowledge in relation to the relevant sporting event naturally directly affects his or her chances of winning. Thus, a large share of all regular ‘Stoihima’ players share a common interest in sports. In fact, to the HR’s understanding, placing a ‘Stoihima’ bet is often seen as a supplement to watching the actual sporting event: the event itself can be in the foreground, while the bet simply adds an additional element of excitement.

Against this background, the typical ‘Stoihima’ player would be highly unlikely to consider the ‘Stoihima’ game substitutable by numerical lottery games, “mutual games of sports prognostics” (which, while relating to sports events, are in fact more comparable to numerical lottery games than the ‘Stoihima’ type of sports betting, see section (c) below) or casino games. Placing a ‘Stoihima’ bet on e.g. the result of a football match (that you may very well watch) is clearly very different activity from participating in an online live poker tournament or purchasing or filling in a lottery ticket.

As regards player profiles, and as has been mentioned above, the HR considers it likely that the ‘Stoihima’ game is the most popular in age groups which are younger than the age groups among which numerical lottery games are the most popular. Similarly, there is reason to assume that online sports betting mainly attracts comparatively young players. In

comparison, 39% of registered online sports betting players in France are 18-24 years of age, while 30% are 25-34 years old and only 4% are 55 years or older.¹²

As opposed to numerical lottery games (as well as “mutual games of sports prognostics”), a ‘Stoihima’ player who places a bet at certain odds can see for himself what his winnings would be if the bet is successful. This leads to a lower risks of fraud and manipulation, which coupled with the less addictive nature of the ‘Stoihima’ game than certain other games of chance are among the reasons why ‘Stoihima’ may be licensed to third parties in the online channel as of 2020. Also, it can be noted that online gaming services similar to “Pame Stoihima” are already being offered in the Greek market by unlicensed third parties.

Against this background, there are clearly important factual characteristics that distinguish ‘Stoihima’ from, on the one hand, the numerical lottery games (described above) and the mutual games of sports prognostics (see below) which are covered by OPAP’s Exclusive Right, and, on the other hand, from the online casino games which may be open for licensing to third parties from the outset under Law 4002/2011.

The above distinction between betting (such as ‘Stoihima’) and other forms of gambling also finds support in case law in different areas of competition law. As set out below, this case law indicates that:

- (i) the ‘Stoihima’ betting offered by OPAP does not belong to the same relevant product market as e.g. gaming machines, poker or numerical lotteries; and
- (ii) offline and online provision of the ‘Stoihima’ game belong to different relevant product markets.

In its decision of 17 November 1997 on the *Nomura / Blueslate* merger, the Commission noted that betting services (including on-course and off-course betting as well as telephone betting) *cannot* be in the same market as gaming machines (“fruit machines”) installed in pubs in the UK, since “*the demand and supply side characteristics in relation to the business activities concerned are so different*”.¹³

¹² See the French regulatory authority for online games’ (*Autorité de régulation des jeux en ligne*) study “*Analyse trimestrielle du marché des jeux en ligne en France, 3ème trimestre 2011*”, 31 October 2011 (available at <http://www.arjel.fr/IMG/pdf/donnees-supervision-T3-2011.pdf>), p. 12.

¹³ Case IV/M.1037 *Nomura / Blueslate*, decision of 17 November 1997, para. 19.

Importantly, there is a consistent line of case law from the UK competition authorities establishing that *betting is a separate activity* that is not constrained by other forms of gambling or other leisure activities.¹⁴ This view finds support in the case law of the German FCO (referred to above), according to which the relevant market for lotteries is distinct from *inter alia* betting¹⁵, and in the French Competition Authority's opinion of 20 January 2011 (referred to above), which held that games of expertise (such as sports betting) can be distinguished from games of pure chance, and within games of expertise, further distinctions can be made between *inter alia* sports betting and poker.¹⁶

Accordingly, available case law indicates that the 'Stoihima' betting offered by OPAP does not belong to the same relevant product market as e.g. gaming machines, poker or numerical lotteries.

Moreover, there is support in case law in the field of merger control that **offline and online** betting belong to different relevant products markets. In this respect, the OFT has consistently held that betting in licensed betting offices (**LBOs**) forms a distinct product market. In the OFT's investigation of *William Hill / Stanley Plc*¹⁷, third party respondents commented that the growth in telephone and internet betting results from an expansion of the betting market rather than customers switching away from land based betting (LBOs). A majority of respondents submitted that there is limited switching. Absent evidence concerning the share of marginal customers that would, or would be able to, switch to telephone or internet betting, the OFT held that demand side substitution was not considered

¹⁴ The OFT's decision of 16 April 2008 regarding Ladbrokes Ltd's acquisition of Eastwood Bookmakers; the OFT's decision of 27 September 2005 regarding the acquisition by Hilton Group plc through Ladbroke Racing (Reading) Limited of Jack Brown (Bookmaker) Limited; the OFT's decision of 1 August 2005 regarding the acquisition by William Hill of the licensed betting offices of Stanley Plc; and the Monopolies and Mergers Commission's report on Ladbroke Group PLC and the Coral betting business (1998, Cm 4030), as well as the other cases referred to in the said decisions.

¹⁵ FCO decision of 23 August 2006 in B 10-148/05, *DLTB and federal lottery companies*, paras 172-190 and FCO decision of 29 November 2007 in B 6-158/07, *LRP/Lotto Rheinland Pfalz*, paras 114-120.

¹⁶ Autorité de la Concurrence Avis n 11-A-02 du 20 Janvier 2011 relatif au secteur des jeux d'argent et de hasard en ligne.

¹⁷ OFT decision of 1 August 2005 in ME/1716-05, *acquisition by William Hill of the licensed betting offices of Stanley Plc*.

to merit a product scope wider than LBOs. The OFT has subsequently upheld this market definition in more recent decisions.¹⁸

The distinction between online and offline sports betting also finds support in the French Competition Authority's opinion of 20 January 2011 (referred to above), which identifies several differences between online and land based supply, such as: (i) more information is available in the context of online betting; (ii) online betting is available 24/24h, whereas land based betting is limited by office opening hours; and (iii) there is a great variety of bets online and live betting is only available online. The authority also referred to the different sociological profiles of the players that play online or at the physical selling offices.¹⁹ Finally, it can be noted that in its investigation of the bwin/Partygaming merger, the Romanian Competition Authority assessed the merger on the basis of a distinct relevant market for *online sports betting* (without conclusively defining the exact scope of the relevant market).²⁰

Against this background, the HR notes that the offline and online provision of betting are likely to relate to two distinct relevant product markets for the purpose of EU competition law.

It follows from the above that (i) 'Stoihima' (which may be open for online licensing to third parties as of 13 October 2020); (ii) the games which according to the Addendum will remain covered by OPAP's Exclusive Right both offline and online²¹; and (iii) the online (live) casino games which may be open for licensing to third party operators from the outset under Law 4002/2011 (and which are further described below) are neither "*similar, comparable, equivalent or substitutable from the consumer's perspective*" nor factually and legally comparable for the purpose of State aid law. Furthermore, the HR notes that there are substantial differences between offline and online 'Stoihima' (e.g., these games are played by different groups of players), and that (in light of the case law referred to), these games are

¹⁸ See decisions of 16 April 2008 in case ME/3551/08 regarding Ladbrokes Ltd's acquisition of Eastwood Bookmakers and of 1 August 2008 in case ME/3627/08 regarding Ladbrokes plc's, through North West Bookmakers Ltd, acquisition of McCartan Bookmakers.

¹⁹ Autorité de la Concurrence Avis n 11-A-02 du 20 Janvier 2011 relatif au secteur des jeux d'argent et de hasard en ligne.

²⁰ In addition, distinct markets for online poker, online casino games and online bingo were assessed. See the Romanian Competition Authority's Decision no. 7 of 25.02.2011 on the economic concentration resulting from Bwin Interactive Entertainment AG's merger into Party Gaming PLC.

²¹ I.e. the numerical lottery games and the mutual games of sports prognostics covered by OPAP's Exclusive Right.

unlikely to be regarded as direct substitutes by consumers. Consequently, there are good arguments why offline and online ‘Stoihima’ should not be regarded as legally and factually comparable in the Extension Period.

(c) Mutual games of sport prognostics

As mentioned above, OPAP also provides two different so called “*mutual games of sport prognostics*”: “Propo” and “Propogoal” (and also has the right to offer “Prognostika Agonon Basket” and “Prognostika Agonon Omadikon Athlimaton”, which are currently not operational). While these games could be referred to as sports betting games, they are in many aspects more similar to numerical lottery games. While player skills or knowledge of football teams’ past performance may to some extent affect the chances of winnings in “Propo” and “Propogoal”, such skills are by no means necessary for playing the games, and even purely random choices when e.g. filling in a “Propo” ticket statistically stand a chance of winning which may be comparable to that of choices made by a knowledgeable player.

According to OPAP, players of “Propo” and “Propogoal” are typically at least 45-50 years old, and can be described as a traditional type of players, who otherwise prefer to play numerical lottery games (such as “Lotto”). These players are not likely to be the same as the typical players of ‘Stoihima’ (see above) or online casino games (see below). Only approximately 3% of OPAP’s players play mutual games on sports prognostics.

Although related to football matches, “Propo” and “Propogoal” lack the very close connection to particular sporting events which is so important for many players of the ‘Stoihima’ game – for instance, “Propo” and “Propogoal” are based on a pre-determined selection of matches, meaning that the player cannot choose to simply bet on a specific result by his or her favourite team. As set out above, ‘Stoihima’ players are unlikely to consider “Propo” and “Propogoal” as substitutes to ‘Stoihima’, and conversely, “Propo” and “Propogoal” players are unlikely to consider “Propo” and/or “Propogoal” as substitutable by e.g. ‘Stoihima’ or (perhaps even less so) by any casino games. In fact, in OPAP’s view, numerical lottery games such as “Lotto” are the closest substitutes to “Propo” and “Propogoal”. While e.g. “Lotto” lacks the connection to football, the main characteristics of e.g. “Lotto” and “Propo” in terms of frequency of draws, ability to choose multiple combinations (“systems”), overall chance of winnings and general appearance are to some extent similar. On the other hand, filling in a “Propo” or “Propogoal” ticket (perhaps randomly) is clearly a very different activity from e.g. taking part in an online poker tournament, or placing a ‘Stoihima’ bet on a specific sports or non-sports event.

To the HR’s knowledge, no mutual games of sports prognostics are currently being offered online in the Greek market.

The special characteristics of games such as “Propo” and “Propogoal” have been observed in case law, which indicates that for the purpose of competition law, these games may either constitute a distinct relevant product market or (indeed) form part of the same product market as *numerical lottery games* of the types operated by OPAP.

In relation to “football pools” – a UK equivalent to the “Propo” game – the UK Competition Commission has concluded that the “*most prominent potential substitute for football pools is the National Lottery*”²², and noted that “*Like the pools, the National Lottery ‘Lotto’ game is a ‘numbers’ game, played weekly, with low stakes, long odds and large jackpots*”.²³ It is noteworthy that of the respondents to a market investigation survey referred in the case, only 11% said that they would switch to a *non-pools* gambling product if their main operator would no longer provide pools, and out of those who would switch, 82% would switch to the National Lottery. Even though, following an in-depth assessment of the market characteristics, the Competition Commission concluded that the relevant market in the case was no wider than football pools²⁴, it is notable that the market definition section of the Competition Commission’s report does not refer to other *sports betting* (such as ‘Stoihima’) as a potential substitute for football pools (but only to the National Lottery).

It follows from the above that while “Propo” and “Propogoal” (as well as “Prognostika Aganon Basket” and “Prognostika Aganon Omadikon Athlimaton”, which are currently not operational) may to some extent be comparable to certain of OPAP’s numerical lottery games, the said mutual games of sports prognostics and the types of games which may be open for licensing to third party operators under Law 4002/2011 (as set out above) are neither “*similar, comparable, equivalent or substitutable from the consumer’s perspective*” nor factually and legally comparable for the purpose of State aid law.

(d) Online live casino games

As set out above, at this point in time, the HR has no complete strategy for which games shall be conducted outside the monopoly. Given the scope of OPAP’s Exclusive Right, it can however be assumed that online live casino games may be opened for licensing to third parties under Law 4002/2011. Such online live casino games – for instance live poker

²² The UK National Lottery operates numerical lottery games such as ‘Lotto’, ‘Thunderball’ and ‘EuroMillions’.

²³ UK Competition Commission, *A report on the anticipated acquisition by Sportech plc of the Vernons football pools business from Ladbrokes plc*, 11 October 2007, para. 5.68.

²⁴ UK Competition Commission, *A report on the anticipated acquisition by Sportech plc of the Vernons football pools business from Ladbrokes plc*, 11 October 2007, paras 5.83-84.

tournaments²⁵ – share a connection to the traditional casino environment, and online games of this type generally seek to convey this feeling. While some of these games (perhaps in particular live poker tournaments) are clearly games of expertise, other casino games (such as roulette) are games of pure chance. The HR considers it likely that online casino games in general attract primarily younger players than, for instance, numerical lottery games (see above). In this respect, by means of comparison, it can be noted that the single largest group of registered *online poker* players in France (42%) are 25-34 years of age, while only 4% are 55 years or older.²⁶

From a visual perspective, and from the perspective of the player's experience, online casino games such as live poker tournaments have little in common with the games that are subject to OPAP's Exclusive Right (i.e. the numerical lottery games, games of mutual sports prognostics and the 'Stoihima' game, as described above). The activity of participating in an online live poker tournament (or taking part in any other online live casino game) is by no means the same as, but very different from playing any of OPAP's exclusive games, through for instance placing a sports bet or filling in a "Lotto" or "Propo" ticket. Against this background, those who play OPAP's exclusive games (be it 'Stoihima', numerical lottery games or mutual games or sports prognostics) are very unlikely to consider the said exclusive games substitutable by any online live casino games.

In its decision of 20 September 2011 concerning the Danish Gaming Duties Act²⁷, the Commission found that "*online and land-based casinos should be perceived as being legally and factually in a comparable situation*" (para. 94). The Commission did not distinguish between different (casino) games, but noted that the games offered by the relevant land-based and online operators, including "*roulette, baccarat, punto banco, blackjack, poker and gaming on gaming machines*" were "*equivalent*" and formed "*part of the same activity of gambling, regardless of their online or land-based setting*" (para. 88). Clearly, however, the paragraphs referred to do not suggest that *other* types of gaming activities than the said casino games would be in any way comparable.

²⁵ Provided that the result of the game is not (only) generated by RNG (as mentioned above, the VLT Licence provides that if the result is generated by RNG, the said games may not be offered in the online channel by any operator, including OPAP, for the duration of the VLT Licence).

²⁶ See the French regulatory authority for online games' (*Autorité de régulation des jeux en ligne*) study "*Analyse trimestrielle du marché des jeux en ligne en France, 3ème trimestre 2011*", 31 October 2011 (available at <http://www.arjel.fr/IMG/pdf/donnees-supervision-T3-2011.pdf>), p. 12.

²⁷ Commission decision of 20.09.2011 *on the measure No C 35/2010 (ex N 302/2010) which Denmark is planning to implement in the form of Duties for Online Gaming in the Danish Gaming Duties Act (Danish Gaming Duties Act)*.

The distinction between games belonging to the family of *casino games* and other types of games of chance has been upheld in a number of decisions in other areas of competition law, primarily merger control. Thus, casino gambling has been considered distinct from betting²⁸ and lotteries²⁹; ‘fruit machines’ have been considered distinct from betting³⁰; and video lottery terminals distinct from games such as ‘Lotto’³¹.

It has also been suggested that the game of poker (which is a game requiring certain expertise on the side of the player) would not belong to the same relevant product market as games of *pure chance* (such as, in the field of casinos, the game of ‘roulette’), and that online and offline poker do not form part of the same relevant product market.³² The HR considers that the question of whether the online live casino games that could be open for licensing and competition under Law 4002/2011 should be further segmented (e.g. *games requiring expertise / games of pure chance, online casinos / land-based casinos*) or if all such games (whether online or offline) are legally and factually comparable (similar to the finding of the Commission in relation to the Danish Gaming Duties Act) can be left open in the present case, since none of the online live casino games at hand are covered by OPAP’s Exclusive Right.

Based on the reasoning in the case law referred to above (including in relation to the Danish Gaming Duties Act), it appears clear that online live casino games (such as online live poker tournaments) that may be open for licensing and competition under Law 4002/2011 should not be considered legally and factually comparable to (nor belong to the same relevant product market as) the games comprised by OPAP’s Exclusive Right. In this respect, see further the respective sections above on the different types of games.

5. Conclusion

As set out above, the games covered by OPAP’s Exclusive Right and the games which may be made available for licensing to third parties under Law 4002/2011 are not “*similar*,

²⁸ Compare the OFT case law referred in relation to sports betting above.

²⁹ Compare the FCO case law referred in relation to numerical lottery games above.

³⁰ Commission in Case IV/M.1037 *Nomura / Blueslate*, decision of 17 November 1997, para. 19 (referred to above).

³¹ Commission in Case COMP/M.4114 *Lottomatica/GTECH*, decision of 19 May 2006 (referred to above).

³² See the opinion of the French Competition Authority referred to above (Autorité de la Concurrence Avis n 11-A-02 du 20 Janvier 2011 relatif au secteur des jeux d’argent et de hasard en ligne).

comparable, equivalent or substitutable from the consumer's perspective" nor legally and factually comparable for the purposes of State aid law.

II. The 'Stoihima' game

Regarding the 'Stoihima' game which is performed under an exclusive right by OPAP, according to your submission this game will be opened to online third party licensees during the Extension Period (from 13 October 2020 to 12 October 2030) pursuant to the Addendum to the Concession Agreement.

3. On this basis, could you confirm that OPAP will be exempted during the Extension Period from the 30% gross profit tax and the 10% withholding tax for winnings less than €100 on the profits generated by the 'Stoihima' game while the online operator licensees will be subject to these taxes for the profits generated by the 'Stoihima' game?

OPAP's Exclusive Right during the Extension Period under the Addendum only covers the offline provision of the 'Stoihima' game, while the online provision of the 'Stoihima' game may be licensed to third parties (i.e. open to competition) in that period. Thus, in accordance with the Addendum, a distinction needs to be made between the offline offering (which will remain in the monopoly area) and the online offering (which will be part of the *non-monopoly* area) of the 'Stoihima' game.

Offline

In line with all other games of chance in the monopoly areas (except for the VLTs operated by OPAP), the 30% GGR tax will not be payable for OPAP's offline provision of 'Stoihima' in the Extension Period, nor will players' winnings of up to EUR 100 be subject to taxation (while winnings exceeding EUR 100 will be taxed at 10%, and winnings exceeding EUR 1,000 will be taxed at 15%). However, a large share of the consideration already paid by OPAP for its Exclusive Right in the Extension Period (in the amount of EUR 375 million) relates to the offline provision of the 'Stoihima' game (which, after Kino, the OPAP game accounting for the highest turnover), and in addition, 5% of the GGR relating to the offline provision of 'Stoihima' will be payable to the State as part of the consideration payable for OPAP's Exclusive Right under the Addendum.

Online

Since the online provision of the 'Stoihima' game in the Extension Period will not be part of OPAP's Exclusive Right, but of the online segment which may be opened up to competition

(the non-monopoly area), it will be subject to the same fiscal treatment as any other non-monopoly online games licensed under Law 4002/2011.³³ Consequently, if OPAP would choose to apply for a licence in order to provide ‘Stoihima’ online in the Extension Period, in competition with third parties licensed under Law 4002/2011, OPAP would be subject to the 30% GGR tax and the flat 10% tax on players’ winnings.

4. *If so, how would you justify this fiscal advantage granted to OPAP? Would this imply that Clauses 6-8 of the Addendum would also be triggered? Would enforcement on Article 6 fully eliminate such an advantage? If yes, please explain in detail how this clause would be implemented in practice in such a case.*

Online

As set out above, according to the Addendum, OPAP’s (potential) online provision of the ‘Stoihima’ game in the Extension Period is not part of OPAP’s Exclusive Right and will consequently be subject to the exact same tax treatment as any other non-monopoly online game of chance. Consequently, any fiscal advantage for OPAP can be excluded in this respect.

Offline

Nor would the fact that OPAP’s offline ‘Stoihima’ operations are not subject to the 30% GGR tax or the flat 10% tax on players’ winnings mean that there is an advantage to OPAP which meets the criteria of Article 107(1) TFEU:

- As noted above, the HR considers that ‘Stoihima’ online and ‘Stoihima’ offline should not be considered as legally and factually comparable in the Extension Period. Consequently, differences in taxation between online and offline ‘Stoihima’ in the Extension Period would not constitute a *selective* advantage in the meaning of Article 107(1) TFEU.
- Furthermore, as set out in the HR’s response to the RGA’s complaint, the differentiated tax treatment between the monopoly and non-monopoly areas (including offline and online ‘Stoihima’ in the Extension Period) is justified since it

³³ Article 26 of Law 4002/2011 provides that the provisions on taxation under the law do not apply for games for which OPAP is licensed. As set out in the response to question 5 below, the Addendum only extends OPAP’s licence to conduct offline ‘Stoihima’ (in the Extension Period). For online ‘Stoihima’, no licence has been granted to OPAP for the Extension Period. Consequently, in the Extension Period, online ‘Stoihima’ is subject to the provisions on taxation set out in Law 4002/2011.

“arises from the nature or the general scheme of the system of which the measures form part”.³⁴

- Even if the Commission would, wrongly, come to a different conclusion, the HR submits that the fact that OPAP’s offline provision of ‘Stoihima’ is not subject to the 30% GGR tax does not confer any advantage on OPAP, since the consideration that OPAP pays under the Addendum imposes the same economic burden on OPAP as if a GGR tax had been charged.³⁵
- Finally, as will be explained below, the compensation mechanism in Clauses 6-8 of the Addendum means that if offline ‘Stoihima’ would become subject to 30% GGR tax, part of the consideration paid by OPAP for the extension of its Exclusive Right effectively constitutes a prepayment of said GGR tax.

Applicability of Clauses 6-8 of the Addendum

The fact that the online – but not the offline – provision of the game ‘Stoihima’ in the Extension Period will be subject to the 30% GGR tax and the 10% withholding tax on players’ winnings below EUR 100 would *not* in itself imply that Clauses 6-8 of the Addendum would be triggered. As set out above, the HR considers that these differences in taxation are fully in line with EU law.

Clauses 6-8 of the Addendum would only be triggered in case a 30% GGR tax would be imposed on games covered by OPAP’s exclusive right under the Addendum (such as offline ‘Stoihima’) *“due to future legislative changes or as a result of the application of the European Union law”*. Consequently, the applicability of Clauses 6-8 presupposes that there is either:

- (i) a legislative change which would extend the scope of the 30% GGR tax provided in Article 50 of Law 4002/2011 to also cover offline ‘Stoihima’; or
- (ii) a decision by a competent body establishing that EU law requires offline ‘Stoihima’ to be subject to the 30% GGR tax.

³⁴ See e.g. judgment of the CJEU of 15 November 2011 in joined cases C-106/09 and C-107/09 *Commission and Spain v Government of Gibraltar and the United Kingdom*, para. 145.

³⁵ See in this respect the HR’s response dated 2 December 2011 to the RGA Complaint, section II.3(d).

Please note that in any case clauses 6-8 of Addendum would not be triggered in case of an imposition of the 10% withholding tax on winnings of up to EUR 100, and do not provide for any compensation to OPAP in case that tax is imposed on games covered by OPAP's Exclusive Right.

Enforcement and practical implementation of Clause 6 of the Addendum

It should be stressed that as far as 'Stoihima' is concerned, in the event that Article 6 of the Addendum is triggered, the offline provision of the 'Stoihima' game would *already* be subject to the 30% GGR tax, since this is a prerequisite for the applicability of the said Article 6 (see above). As such, any advantage to OPAP arising from the taxation of offline 'Stoihima' (in comparison to online 'Stoihima') would already have been eliminated once the compensation clause is triggered.

Article 6 provides that GGR tax imposed would be deducted from the consideration payable by OPAP under Article 3 of the Addendum, i.e. the licence fee³⁶:

"... the consideration under paragraph 3 shall be reduced by the amount of participation of the State imposed by that legislative change up to 80% of the consideration..." (see Article 6 of the Addendum).

The mechanics of this clause are as follows:

- EU decision or change in law leads to a 30% GGR tax liability of OPAP for the provision of offline 'Stoihima'. OPAP would thus pay such tax as of the start of the Extension Period.
- In order to avoid double payment³⁷, the HR reimburses OPAP that portion of the licence fee that would cover the amount of the 30% GGR tax on the predicted revenues from the provision of offline 'Stoihima' during the Extension Period (plus interest).

³⁶ I.e. the lump sum of EUR 375 million and the State's participation of 5% of GGR.

³⁷ As has been set out in the HR's response to the RGA's complaint, in the context of an exclusive licence, an additional tax burden would translate directly into a decrease of future profits of in identical amount, which in turn would reflect identically in the (lower) fair value of the exclusive licence or the extension of that licence.

Thus, the compensation mechanism only shields OPAP from an obligation to pay double, but does not overcompensate OPAP in any way.

Moreover, the mechanism in Clause 6 is “capped” at 80% of the licence fee.

As regards the implementation in practice of the mechanism: if the 30% GGR tax provided is imposed on offline ‘Stoihima’ (triggering the mechanism), Article 50, Paragraph 5 of Law 4002/2011 provides that such GGR tax would be payable by OPAP every three months. In that case, OPAP would first have to pay the tax as set out in the law, and may then claim compensation (in the amount of the taxes paid) as provided in Clause 6 of the Addendum (up to the cap set out above). As set out in Clause 8, as a general rule, OPAP is not entitled to actually receive any amount claimed as compensation (and such amount incurs no interest) – OPAP may only set off its claim for compensation against taxes which are or will be payable, e.g. in the next trimester (for offline ‘Stoihima’ or for the VLTs, which are subject to the 30% GGR tax).

5. Could you confirm the exact legal basis in the Addendum providing for the possibility for third parties to offer the 'Stoihima' game online after 2020? If necessary, please submit copy of this provision.

Clause 2 of the Addendum extends OPAP’s license and its Exclusive Right for all 13 games when conducted **offline** but only for 12 games (excluding ‘Stoihima’) when conducted **online**.

Article 26 of Law 4002/2011 provides that (save for provisions concerning the Gambling Supervision and Control Commission and commercial communications), Law 4002/2011 does not apply for games for which OPAP is licensed. For online ‘Stoihima’, no licence has been granted to OPAP for the Extension Period. Consequently, in the Extension Period (starting on 13 October 2020), Law 4002/2011 in its entirety applies to online ‘Stoihima’.

It follows from the above that for the duration of the Extension Period, online ‘Stoihima’ is open to all interested operators, who, similar to OPAP, will have to apply for a licence under Law 4002/2011.

III. Deloitte’s evaluation

In your submission, you pointed out that the consideration payable by OPAP in accordance with the Addendum would be based on the fair market value of the extension, on the basis of a valuation carried out by Deloitte. This consideration would take into account the value of a hypothetical 30% tax on gross gambling revenues.

6. In that regard, to what extent does this estimation take into consideration the tax exemption of the 10% tax applicable to winnings less than €100 on games performed by OPAP?

Deloitte has informed the HR that as the winnings tax is levied on players, it is as such irrelevant to the hypothetical tax on OPAP's gross gaming revenue, and does not affect the estimation of the value of the extension of OPAP's Exclusive Right. For the avoidance of any doubts, the HR asked Deloitte by email of 26 January 2012 to confirm (i) that Deloitte was fully aware of the differences in the taxation of players' winnings (i.e. that games offered by third party online operators in the non-monopoly online segment will be subject to a flat 10% withholding tax on all players' winnings, even below EUR 100, while players' winnings from OPAP's exclusive monopoly games are tax free up to EUR 100, winnings above EUR 100 are taxed at 10%, and winnings above EUR 1,000 are taxed at 15%) and (ii) that these differences in taxation of players' winnings do not affect the estimation of the value of the extension of OPAP's exclusivity right.

Deloitte responded by email on 26 January 2012 that:

“Indeed we confirm that we are aware of the difference in taxation and that based on the methodology and the assumptions that we applied on the valuation exercise we carried out, the final outcome was not affected by this tax matter. This tax issue may somehow affect overall consumer behavior, but for the purpose of the valuation that we carried out, this small deference in tax rates, is not affecting our valuation methodology and results.”

Consequently, Deloitte's valuation took the differences in the taxation of players' winnings into account, but in the view of the independent expert (Deloitte), these differences do not affect the estimation of the value of the Exclusive Right.

7. Does this estimation take into account the valuation of the 13 games under OPAP's monopoly? It appears that the consideration evaluated by Deloitte would refer only to 9 games (cf. Deloitte Study, *Independent Valuation in Relation with the Potential Extension of OPAP S.A.'s Exclusivity Right, 26 September 2011 - Final Report, p. 3-4*). Could you please confirm that the 13 games have been taken into account in the valuation of the consideration?

Page 3-4 (section 3.5) of Deloitte's valuation lists the nine (9) games which are currently operational out of the 13 games covered by OPAP's Exclusive Right, i.e. “Propo”, “Lotto”, “Proto”, “Propo-Goal”, “Joker”, “Stoihima”, “Super 3”, “Extra 5” and “Kino”. On the other hand, as set out above, the four (4) games “Super 4”, “Bingo Lotto”, “Prognostika Agonon Basket” and “Prognostika Aganon Omadikon Athlimaton” are not currently operational.

While all 13 exclusive games were taken into account by Deloitte, Deloitte did not assume any future revenues relating to the following four games which are not currently operational (as per Deloitte's understanding and based on the data that Deloitte reviewed during the course of the analysis, there was no visibility as to if and when they will be launched by OPAP in the future).