



EXECUTIVE SUMMARY

1. The contributors – EGBA and RGA

This contribution is submitted by the European Gaming and Betting Association (EGBA) and the Remote Gambling Association (RGA) jointly on behalf of their member companies. In addition it is supported by a number of other EU licensed online private operators. All are committed to making a positive contribution to the discussion on the Dutch draft law.

The EGBA and RGA represent the major online private operators licensed in the EU, providing online gambling services to more than 20 million adult European consumers and possessing an unrivalled wealth of expertise, experience and insights that can be called upon to ensure that the re-regulated Dutch market is a long term success.

2. Introduction

The RGA and EGBA welcome the modernisation of the Dutch gambling policy, which has remained largely unchanged for nearly fifty years since the entry into force of the current Gambling Act (WoK 1964). Today's digital reality and well-established demand of Dutch consumers for premium online gambling and related digital entertainment services requires an appropriate legal framework to provide a well regulated Dutch online gambling market that is sufficiently competitive with the .com offer.

The RGA and EGBA wholeheartedly endorse the central objective of the Dutch government *“to channel the existing and future need for games of chance via internet and other future electronic means of communication to a responsible, reliable and checkable offer, leading the player to a regulated offer with guarantees against gambling addiction and crime with a suitable and attractive offer... The legal games of chance offer has to be so attractive that players feel no need to use the sites of illegal providers”*.¹

The RGA and EGBA acknowledge the Dutch Government's view that effective consumer protection, including responsible gambling, can be achieved to a greater extent if Dutch consumption is channelled towards locally regulated NL operators. The attractiveness of the local Dutch offer, product range, user experience and pricing, will determine how many Dutch consumers will choose to play within the Dutch regulated market and thus how many will decide to continue play outside the Dutch licensing scheme.

Clearly, if a significant majority of Dutch consumers do not find the locally licensed product sufficiently attractive then they will continue to gamble with .com operators based in other jurisdictions, many of them outside of the EU, where consumer protection standards may be lower

¹ Explanatory Memorandum, page 3 and page 11

than those in the Netherlands. Whilst all online consumers are price sensitive, some are highly price and user experience sensitive, and all will be able to find – without much burden – an alternative offer if the regulated offer is not made attractive enough. In short the success of the proposed regulation of the Dutch market will largely depend on the extent to which it will be able to capture the largest possible number of Dutch players.

Therefore the RGA and EGBA call upon all policymakers to introduce a viable regulatory regime, including online gaming taxes as enabler of its policy, that will lead to a maximum channelling of consumption to Dutch licensees and avoid leakage to non-Dutch regulated operators. If this cannot be achieved then the Dutch Government runs the serious risk of failing to achieve its stated policy objectives.

3. Points of consideration

Whilst the policy concept behind the proposal is positive and well-defined, the proposal itself does contain a number of issues of serious concern. These issues will need to be addressed for the overall policy objectives to be achieved. We encourage the Dutch government and the Parliament to continue the on-going dialogue with all stakeholders and to seek sustainable solutions based upon experience, expertise and facts. With this in mind, the RGA and EGBA are asking the Dutch government to reconsider the following aspects of its current proposals:

1) The channelling objective should be to cover all Dutch consumers

▪ Level of channelling

The a priori ambition to merely channel 75% of Dutch consumption to the regulated online operators (and thus also to a priori disregard the other 25%), is not sufficiently ambitious. We would suggest that the objective should be to at least try to ensure the right level of protection for all Dutch citizens. A higher degree of channelling, for instance, above 90%, would also mean there was enough scale under the Dutch licence for operators within the Dutch regulated framework to sustain and compete with .com operators outside the Dutch licensing scheme.

▪ Overall costs and the effect on competitiveness

The total effective cost on operators of the combined taxes and levies (around 27% Gross Win) will prevent even the target of 75% of consumer channelling from being achieved. This is simply because such a high cost base will make it extremely difficult for Dutch licensees to compete effectively with operators based in lower tax .com jurisdictions and create sufficient consumer value. As mentioned previously Dutch licensees will not be able to compete on value or choice and so Dutch consumers will seek out better offerings being provided from other jurisdictions with “just one mouse click”. This will ultimately undermine the whole Dutch gambling policy.

Independent leading research demonstrates that a realistic online gambling taxation rate of 10% GW will secure 40% more channelling than in the proposed 27% GW model and achieve the highest level of channelling (96%) and consumer protection. In a 10% GW online gambling tax model the Dutch primary policy objectives will be met in the most optimal manner. This taxation level still allows the Dutch model to be sufficiently attractive and price competitive compared to the competitive global .com industry, operating from zero or low tax gambling jurisdictions. Moreover, the financial goals of the Coalition Agreement (25m-31m EUR) can be met in a sustainable manner.

2) Consumer protection and responsible gambling

The RGA and EGBA support the primary policy objective of consumer protection and the operator's own duty of care as part of a bigger shared responsibility, but call upon Dutch policy stakeholders, as part of fact based policy making, to:

- Consider that the vast majority of the population (98%) do not experience gambling problems, and acknowledge that new technologies also provide more efficient solutions (online tools, fact based treatment, ease of communication, transparency etc.). The view that online gambling is anonymous and/or inherently more dangerous is not justified. The truth is that problem gambling rates for comparable on and offline gambling products are very similar and that online gambling companies undertake thorough customer identity and verification checks when every account is opened.
- Clarify the scope of the duty of care for operators and make sure that any obligations placed on operators are appropriate, proportionate and effective.
- Clarify and provide more guidance on the categorization of players in terms of approach, avoiding a "one solution fits all" model, and instead adopt a subjective approach based upon the individual customer's behaviour.
- Focus on a preventive 'self-empowerment' approach for all players, which underwrites the channelling objective, providing transparent information and offering online gaming account tools that allow players to stay in control of their behaviour ("informed adult choice").
- Focus on the provision of specialist treatment and the (6 month) exclusion of problem gamblers per registration in the central register which applies to the entire industry (all products, on and offline).
- Encourage all stakeholders to cooperate in a structured and constructive manner, enabling the continuous improvement of the Dutch model and the understanding of problem gambling, ultimately generating a more efficient responsible gambling policy (both publicly and internally).

3) Compliance with EU Law and the TFEU

In the absence of a harmonised EU framework, Member States have a limited scope to define national gaming policy, but the Netherlands is required to comply with its obligations under EU law.

We, therefore, invite the Netherlands to

- Establish a consistent and non-discriminatory gambling policy compliant with the overriding principles of EU law (including during the present transition phase). In this way the Netherlands will avoid the risk of being referred to the CJEU for continued breach of EU law or subject to potential new procedures by the European Commission, providing reasonable legal cause for EEA established .com operators to stay outside the Dutch licensing scheme and transparent allocation of licenses.
- Consider the rights of EEA established operators to provide and promote cross-border services under fundamental Internal Market Freedoms and acknowledge the right of choice and privacy of the Dutch consumer. Proper consideration should also be given to competition law and the significant market position (SMP) incumbent operators have.
- Take into consideration that forcing EEA established operators to relocate their primary gaming server to the Netherlands is a breach of EU law.

Adopting a different tax rate for online gambling is in line with current practise in the Netherlands to tax differently across the entire gambling spectrum and the Dutch government's broader practise to support certain policy objectives, e.g. innovation or consumer protection, through specific tax measures. Thus online tax differentiation as enabler of Dutch gaming policy cannot constitute state aid. In contrast, aligning the online taxation model towards the land-based casino model (29% GW), is unjustified state aid as it confers a selective economical advantage to a land-based sector that has a broader financial capacity to absorb higher costs (P&L). It also fails to recognise the fundamental point that Dutch licensed online operators will be primarily in competition with .com operators rather than with any form of land-based gambling.

4. Recommendations

The RGA and EGBA recommend the Dutch policy stakeholders to continue to:

- Optimise channelling to Dutch online licenses and keep the customer at the heart of the gambling policy to ensure that Dutch consumers can benefit from an attractive, well regulated, fair and responsible online gambling experience. By the same token, refrain from anything that may imply that the Dutch gambling policy is also driven by financial objectives.
- Work in dialogue with the gambling industry, to better understand how the objectives and proposed measures can be applied successfully in a real word environment. To that end, continue to see RGA-EGBA members as a useful resource that can help provide solutions to all of the key concerns that might be raised in areas such as responsible gambling, integrity in sports betting or the fight against crime. Reference is made to the CEN standard on consumer protection and responsible gambling, as well as the RGA Technical Standards or the general availability to participate in expert meetings and workshops.
- Produce secondary legislation that is technology neutral, focussing on what needs to be achieved rather than how to achieve it.
- As part of a transparent and non-discriminatory gambling licence allocation process, imposing strict licensing criteria, deterring operators who cannot/will not comply, and avoid any unnecessary duplication by taking account of the risk management policies of the operators, existing safeguards as well as the operator Internal Control System (ICS) (as part of the overall operator suitability test).
- As an integrated part of its own Dutch national policy model (polder model), which is not a mere cut and paste from other Member States, develop an online taxation model that will support the overall regulatory regime for online gambling (i.e. taxation is a means to enable its overall gaming policy to channel Dutch customers away from the non- Dutch regulated .com coffer as to allow effective Dutch consumer protection rather than being an objective in itself).
- As part of the Internal Control System (ICS) and risk based approach (RBA), to impose a general obligation to all operators to report to the competent public authority, any suspicious activity (SAR), including on suspicious betting activity in the context of fighting corruption in sports.
- Fight corruption in sports, including match fixing, i) by structurally anchoring within the licensing scheme and fostering close cooperation between sports, state and operators and ii) by a preventive educational approach that above all focusses on the protection of the athletes and make them less vulnerable to undue influence or pressure. A number of independent studies evidence that the financing of sports, notably not grass root sports, is jeopardised by the proposed reform, but that on the contrary, new opportunities for new and broader financial support are made possible.

- Ensure integrity of sporting events and their associated products. The modern digital anticorruption measures should be harnessed through practical and proportionate cross-sector and multi-jurisdictional partnership agreements. Arbitrary limits on regulated European betting markets would be an unjustified restriction on trade.



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List of Definitions

Bonus: a customer incentive with monetary value that, subject to conditions, is given by the operator to a player to gamble with.

Channelling (canalisation) (*kanalisatie*): the migration of Dutch customers from a foreign operator (.com) towards a Dutch regulated operator (.NL licence)

Gross Win (GW) (*bruto spelresultaat*): stakes or gross money wagered *less* prizes or commission deducted by a betting exchange or poker operator

Gross Gaming Revenue (GGR): see GW

Gross Gaming Revenue tax: the tax on stakes less prizes or gross money wagered after pay -out but before expenses or commission charged; tax revenues = tax rate x stakes x (1-PPR) (where PPR is player pay-out ratio)

Gross Profits: gross gaming revenues *less* other operating costs

Gross Profit tax: tax on gross gaming revenues *less* other operating costs; tax revenues = tax rates x stakes x (1-PPR- marginal cost per € staked)

Online Gambling (or remote gambling): means the participation in gambling services provided at a distance by electronic means in the meaning of information society services as defined by Directive 98/48, whereby "at distance" means that the service is provided without the parties being simultaneously present

KYC (Know your Customer): means the due diligence activities that the online gambling operator or other regulated industry such as financial institutions must perform as part of compliance and risk management obligations to ascertain relevant information from their customers for the purpose of doing business with them

KYT (Know your transaction): means the due diligence activities that an online gambling operator or other regulated industry such as financial institutions must perform as part of their compliance and risk management obligations to ascertain relevant information as to the financial transactions processed in the conduct of doing business

Player account (spelersrekening): the personal account that a customer opened at the licensed online gambling operator, after registration and from which he can participate, in his own name, in online gambling activities, to deposit money (payments) or the ask for withdrawals (pay-out)

Pay-Back ratio (PBR) (*uitkeringspercentage*): the percentage of the total amount of bets staked that is being remitted to winning players as prize money

Primary gaming server: the computer server through which the player account is managed and online gambling transactions are settled

Withdrawal (or Pay-Out): the money that the customer requests back from the online gambling operator and that is consequently remitted from his player account to the external bank account or other financial services provider of the customer

Introduction

The industry contribution offers an in-depth analysis of problematic points raised in the Explanatory Memorandum. In order to provide a comprehensive structure it will commence by a short description of the general framework of EU law in the context of which this proposal must be seen. Even if Member States have a certain freedom to choose their respective gambling regimes, they are obliged to ensure that the legislation is in compliance with the requirements of EU law. The European Commission is re-activating pending infringement cases against several Member States breaching EU law and the Netherlands is one of the Member States subject to an infringement procedure. An in-depth analysis of EU primary and secondary law, gambling-related Court Jurisprudence, as well as competition law will be further elucidated in the second Chapter of the submission.

The document also focusses on specifics of the proposed draft law. It will deliver a fact based interpretation of several statements in the Explanatory Memorandum, demonstrating not only that online gambling does not constitute a greater risk of money laundering than the offline sector (Chapter 1.1.1), but that it also provides greater tools of detection and prevention of problem gambling (Chapter 1.1.2), as well as effective instruments of online age control (Chapter 1.1.3). Subsequently, the issue of as a key gaming policy success indicator will be tackled (Chapter 1.2) and it will be argued that the level of channelling proposed in the draft law is by no means sufficient since it excludes a priori 25 per cent of the Dutch costumers. The Dutch context will be compared with other EU markets (Chapter 1.2.2) and proposal for calculating the total effective tax burden of the Dutch licensing scheme will be provided (Chapter 1.3). Subsequently 20% GW tax and bonuses will be elaborated within the context of the Explanatory Memorandum and the Coalition Agreement (Chapter 1.4).

The following chapters will focus on the proposed policy on problem gambling (2.1) and the role attributed to the operators, stressing nuances related to player categorisation (Chapter 2.1.1), player profile (2.1.2) and duty of care (Chapter 2.1.3), as well as ensuring shared responsibilities (2.3). Then, several concerns of compliance with EU law will be raised, including the Primary Gaming Server requirements (Chapter 3), limited product scope (Chapter 4) and privacy (Chapter 5). Chapter 6 will focus on match fixing and financing of charity and sports.

I. Thematic approach

1 EU framework

Online gambling has been one of the focal points in the fast moving digital Internal Market in recent years. Despite the lack of sector specific gambling legislation at European Union (“EU”) level, online gambling is covered by multiple pieces of secondary EU legislation as well as the fundamental internal market principles and rules, setting out a clear framework for the Member States in terms of prerequisites and principal requirements. In addition, sector-specific initiatives, notably in the field of consumer protection², have further shaped the industry (see also point II 1.2).³

The European Commission, as Guardian of the Treaties, has been heavily involved in the gambling debate, ensuring compliance of national law with EU legislation. The European Commission has identified consumer protection and the development of an attractive range of legal gambling opportunities to effectively prevent consumers from going on non-Dutch regulated sites (“channelling”) as one of the key objectives of a gambling policy⁴, which objective simultaneously lies at the heart of the Explanatory Memorandum.⁵

National regulatory systems must respect EU law. The explanatory memorandum makes reference to EU Treaty principles and the jurisprudence of the Court of Justice of the European Union (“CJEU”) but fails to render a full and correct reproduction of the standing principles set out therein. It is based upon a narrow view of fundamental EU rights and binding principles of EU law, and disregards nuances made in subsequent fundamental jurisprudence of the CJEU.

In a series of judgements, the CJEU has provided clear guidance on the interpretation of the fundamental freedoms of the internal market in the area of online gambling, setting out the circumstances under which restrictive national gambling laws are justified: they must (i) serve imperative requirements in the public interest; (ii) be suitable to achieve the objective which they pursue; and (iii) not go beyond what is necessary in order to attain it (see also point II 1.4). National gambling policies can neither be motivated by financial motives.

EGBA and RGA are concerned about a number of the restrictions and requirements put forward in the draft law as they go against the fundamental freedoms of EU law⁶ and violate the overarching consistency requirement (see also point II 1.4.1) as interpreted by the CJEU, creating market entry barriers and/or impeding equal market conditions. The entirety of these restrictions will generate an unattractive online gambling model which will inevitably lead to an underdeveloped regulated system with sub-optimal channelling (and the persistent practice of non-Dutch regulated operators targeting Dutch customers), ultimately jeopardising the protection of Dutch players.

The draft law also raises a number of serious competition law concerns (see also point II 1.6), where incumbent operators have significant market power (SMP) and an advanced competitive advantage

² See for example the European Committee for Standardization (CEN) Workshop Agreement (CWA 16259:2011), Responsible Remote Gambling Measures, January 2011 (available at <http://www.cen.eu/cen/News/PressReleases/Pages/ResponsibleRemoteGamblingMeasures.aspx>).

³ For a full disquisition, see Points II 1 and II 1.2.

⁴ Communication, *Towards an comprehensive European framework on online gambling*, p. 6, European Commission 2012 (available at <http://ec.europa.eu/sport/documents/comm-121023-onlinegambling.pdf>).

⁵ Explanatory Memorandum, Introduction, page 3.

⁶ Such as: mandatory localization of the primary gaming server, restriction of the product scope, duplication of requirements already in place, potential privacy law infringements, etc.

over the new online market entrants through the use of existing customer databases, brand loyalty, cross-subsidization, etc. to develop their own online operations, enabling them to maintain or even strengthen their dominant position and foreclose the newly re-regulated market from new online entrants. This situation creates an unjustified distortion of competition, in violation of EU competition and internal market rules. The fact that online operators are prevented from applying for Dutch licences, again flying in the face of fundamental EU principles and national and CJEU jurisprudence, contributes even further to the highly disadvantaged position online operators are in.

1.1 Fact based policy making

When regulating any sector it is crucial that policy making is based on facts. This requirement is even greater in a highly technological and fast developing sector, such as online gambling where public policy objectives are additional key concerns. Under the CJEU's settled jurisprudence, non-discriminatory restrictions of the freedom to provide services under Article 56 of the Treaty on the functioning of the European Union ("TFEU") can (only) be justified if they serve imperative requirements in the public interest, are suitable for achieving the objective which they pursue and do not go beyond what is necessary in order to attain it. If a Member State decides to impose greater restrictions on the online market than on traditional retail gambling channels, this Member State must have evidence demonstrating that higher risks connected specifically to the online market actually exist and that the additional restriction imposed is actually consistent with the principle of proportionality.

The RGA and EGBA underline that the draft law contains certain "inaccurate assumptions" and factual elements that are incorrect. Going forward, the RGA and EGBA would like to invite the Dutch policy makers to duly (re)consider the following observations:

1.1.1 Online vs. Offline: No greater risk of money laundering in online gambling

The private industry supports the objective of the draft law which is the prevention of fraud and money laundering, however some of the proposed solutions should be reconsidered as they not always seem to be appropriate to achieve those goals and/or do not mitigate potential risks in the most efficient manner.

In the draft law it is claimed that online gambling poses more risk than traditional forms of gambling, a statement which is untrue and refuted by the CJEU which has stated that, online gambling does not necessarily pose greater risks. In fact the internet features several aspects that can be used to offer gambling more responsibly than in the traditional distribution channels.⁷ This was recently also confirmed by the State Secretary of the Ministry of Security and Justice Fred Teeven in his reply to a number of parliamentary questions. He stated that the internet offers better possibilities in terms of responsible gambling, such as the possibility to monitor and alert risk behaviour and intervene in an advanced stage.⁸

Furthermore, online gambling is a non-cash business so the primary comfort must be sought from and is given by compliance of EU regulated financial institutions. Since there are no anonymous physical cash transactions, all deposits and withdrawals are made via highly regulated financial

⁷ CJEU, Judgment of 30 June 2011 in Case C-212/08 *Zeturf v Premier Ministre*, ECR [2011] 05633, para. 73-83.

⁸ Antwoorden Kamervragen over het verband tussen het verstrekken van vergunningen voor online kansspelen en gokverslaving, 10 June 2013, 2013Z09214, available at <https://zoek.officielebekendmakingen.nl/ah-231586.pdf>

service providers and KYC/KYT is ensured. This makes for a transparent and highly regulated environment that is not conducive for money laundering. If there would be a risk of money laundering, this would imply that the “dirty” money is already in the financial systems. We note that that Dutch online consumers in general make widespread use of the direct banking system provided by their (Dutch) financial institutions. The additional primary compliance and security provided by Dutch banks⁹ makes regulated online gambling even less vulnerable to be used for fraudulent or AML purposes. This conclusion is also corroborated by the fact that the level of financial fraud committed against operators, notably chargebacks, by Dutch resident players is relatively low compared to other EEA jurisdictions.

However, the draft law contains a number of elements that are not supported by evidence and open to contradiction. For instance the ‘Explanatory Memorandum’ explicitly argues that *“it is an acknowledged fact that games of chance via internet involve other and more serious risks of fraud than the games of chance offered on the traditional markets because of the lack of physical contact between the player and the games of chance provider”*.¹⁰ Evidently no consumer industry is immune from criminal activity, however the CJEU’s jurisprudence¹¹, as well as independent studies, surveys and reports¹² have illustrated that there is no evidence that money laundering takes place with EU regulated online gaming operators.

The *Zeturf* judgment demonstrates that online games do not necessarily pose greater risks than offline. Moreover the internet features several aspects that can be used to offer gambling more responsibly than in the traditional offline setting, such as the real-time detection of suspicious transactions, including fraudulent bets, and the registration of digital fingerprints.¹³ In a regulated online environment, internet transactions are traceable and transparent. The EC Green Paper statement confirms that *“on-line gambling provides operators with more sophisticated possibilities to track the transactions of each player compared to off-line gambling formats”*¹⁴, thus illustrating the point that the online operators can collect and confirm a variety of information about the player, whereas in an offline environment, such traceability is almost impossible to replicate.

On 1 July 2011, DG Internal Market and Services held expert-based workshops within the framework of the Green Paper consultations. During the expert workshop dedicated to “online-gambling and prevention of fraud and money laundering”, the participants representing the relevant sectors, i.e. public and private gambling operators, gambling regulators and online payment service providers¹⁵, addressed issues concerning the protection of public order, in particular looking at existing measures in place to detect and prevent fraud and money laundering. The participants concluded that *“the Internet facilitates the detection and subsequent investigation of fraud and money laundering. Detection systems developed in the on-line gambling sector are state-of-the-art technology and are*

⁹ For instance ABN AMRO, ASN Bank, Friesland Bank, ING, Knab, Rabobank, RegioBank, SNS Bank, Triodos Bank or Van Lanschot Bankiers.

¹⁰ Explanatory Memorandum, Ch.3.4 ‘Fighting Fraud and Crime’, pp.10-11.

¹¹ *Zeturf*, para. 49

¹² Online gambling: Focusing on integrity and a code of conduct for gambling, Europe Economics, 2008.

¹³ In the same vein, the European Commission found in general that “both online and land-based gambling pose the same risks”, see para. 94 of Commission’s decision of 20 September 2011 in Case C 35/10 (*Danish Gaming Duties Act*), which is currently under review by the General Court in Cases T-601/11 and T-615/11.

¹⁴ Green Paper on online gambling in the Internal Market, page 27, European Commission, 2011.

¹⁵ Workshop participants: Joseph Borg (Lotteries and Gaming Authority, Malta), Kristoffer Cassel (Unibet), Christian Cosmidis (Opap services), Heliodoro Giner (Spanish Casino Association), Neill Ireland (UK Gambling Commission), Christian Kalb (CB Consulting), Michael Levi (Cardiff University), Peter Jelinek (CQR), Gaëlle Menu-Lejeune (Autorité de régulation des jeux en ligne), David Norman (Betfair), Philip Taylor (Alderney Gambling Control Commission)

also used in other sectors such as the banking or the insurance sector".¹⁶ They simultaneously confirmed that there is no evidence that "risks of fraudulent activities and money laundering operations have increased with on-line gambling, as far as regulated gambling markets are concerned".¹⁷

In addition to strict KYC/KYT¹⁸ requirements already in place for operators under national gambling laws elsewhere in the EU, for the first time online gambling has been included in European Commission's proposal for the 4th anti-money laundering directive.¹⁹ The new proposal seeks to extend the scope of the directive by including this time all gambling services (the 3rd directive only covered land-based casinos) to protect sectors such as gambling from being misused for money laundering purposes. The EU-licensed online gambling industry has already been applying standard AML provisions as well as Financial Action Task Force Recommendations²⁰ as a part of their national licensing regimes for a number of years.

The digression should be also made that the proposed measures to prevent fraud and crime outlined in the Explanatory Memorandum²¹ will be difficult to implement due to simple practicalities. For instance the draft implies that all payment methods have to be under the same name which might be hard to guarantee in some cases. Furthermore, all payment methods need to be linked to a bank account, whereas in practice this is not always the case. Withdrawals from the customer's gaming account are to be paid to a given bank account and not to where the deposits came from. However, it should be taken into consideration that certain credit cards are not linked to bank accounts despite being under the same name. Thus if a player makes a deposit with his credit card, but requests a withdrawal to his bank account, this may constitute an increased risk to fraud and money laundering. The theoretical risk can, however, easily be mitigated by ensuring efficient KYC as part of the customer online registration process and/or additional risk mitigation measures as for instance requesting a bank statement to have a third party confirmation that the player is indeed the owner of the bank account concerned (KYT).

Considering the above, the EGBA and RGA request the Dutch government to acknowledge the efforts made by and the inherent benefits of the online gambling industry in monitoring player transactions and detecting any deviating transactions, and to better reflect and balance this in the draft law.

RGA and EGBA recommend that as part of the Internal Control System of the operator and in line with the risk-based approach principles as enshrined in AML legislation, an operator shall always be entitled to suspend suspicious withdrawals. The case being, and in line with the operator's obligations to disclose suspicious activity (SAR), instructions from the competent public body will be requested. Dutch licensed online operators should be entitled to use all payment instruments that are regulated within the EEA area, notably those that are part of SEPA.

¹⁶ Workshop on online gambling: Prevention of Fraud and Money Laundering, 1 July 2011 (available at http://ec.europa.eu/internal_market/services/docs/gambling/workshops/workshop-iv-conclusions_en.pdf), Brussels, Conclusions p.3, for more information Key Conclusions of EC online gambling workshops, available at <http://www.responsiblegamblingday.eu/downloads/2011/KeyConclusionsontheECworkshopconclusions.pdf>

¹⁷ Ibid., p.1

¹⁸ KYC/KYT stands for "Know Your Customer/Know Your Transaction"

¹⁹ Proposal for a directive of the European Parliament and of the Council on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, more information available at [http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=COM\(2013\)0045](http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=COM(2013)0045).

²⁰ Financial Action Task Force Recommendations, available at <http://www.fatf-gafi.org>.

²¹ Explanatory Memorandum, p. 23-24

1.1.2 Detection and Prevention of problem gambling

The EGBA and RGA advocate a fact-based and correct assessment of the scope of problem gambling and request the Dutch government to (better) acknowledge the overall benefits, including the existence of specific tailored online tools, the online gambling industry provides in terms of detection and prevention.

In that respect, it is noteworthy to mention that the growth of the Internet has not led to an increase in the incidence of problem gambling, which lies around 0.5% to 3% in the overall population in Europe.²² This is corroborated by the fact that national problem gambling prevalence surveys around the world and peer reviewed research have evidenced that problem gambling has remained remarkably stable over the last decade despite the significant increase of Internet access and online gambling opportunities²³. The SINTEF study conducted on behalf of the Norwegian Gaming and Foundation Authority in 2007 confirmed that despite a substantial increase “in the Norwegian gambling market, the prevalence of gambling problems has been stable”.²⁴ The Dutch WODC of 2011 marked a slight reduction of problem players in the Netherlands in comparison to 2005.²⁵

A 2010 research study on National Gambling Regulations and the Prevalence Rates of Pathological Gambling confirmed that there is no real correlation between national regulation and pathological gambling and that the level of gambling addiction remains stable throughout the various national systems.²⁶

Figure 1: Prevalence Rates of Pathological Gambling

Country	Year	Screen	Percentage	Article
Sweden	2008/ 2009	PGSI	0.3	As cited in British Gambling Prevalence Survey 2010
Norway	2008	NODS	0.8	Øren, A., & Bakken, IJ. (2007). <i>Pengespill og pengespillproblem i Norge 2007 [Gambling and Gambling, Problems in Norway 2007]</i> . Oslo: SINTEF Helse.
Canada	2003	PGSI	0.5	Cox B., Yu N., Afiffi T & Ladouceur RA. (2005). National Survey of Gambling Problems in Canada. <i>Canadian Journal of Psychiatry</i> . 50, 213-217.
New Zealand	2006/ 2007	PGSI	0.4	Cox B., Yu N., Afiffi T & Ladouceur RA. (2005). National Survey of Gambling Problems in Canada. <i>Canadian Journal of Psychiatry</i> . 50, 213-217.
UK	2010	PGSI/ DSM-IV	0.7/0.9	British Gambling Prevalence Survey 2010
Germany	2007	SOGS	0.6	Federal Center for Health Education (BZgA) (2008). <i>Glücksspielverhalten und problematisches Glücksspielen in Deutschland 2007 [Gambling behaviour and problem gambling in Germany in 2007]</i> .
Switzerland	2005	SOGS	0.8	Olason DT., Finnbogadottir H., Hauksdottir A., & Barudottir SK. (2003). <i>An Icelandic version of the Problem Gambling Severity Index: A psychometric evaluation</i> . Paper presented at the 27th Nordic Psychiatric congress, Reykjavik, Iceland.
Iceland	2005	PGSI	1.1	Olason DT., Finnbogadottir H., Hauksdottir A., & Barudottir SK. (2003). <i>An</i>

²² Please note that variation may be caused by methodology used.

²³ For instance, the UK Prevalence Study²³ of February 2011 used a sample of 7,756 people and concluded that the rate of problem gaming in 2010 (using two different measures) had slightly increased from 0.6 - 0.7% in 2007 to 0.7% - 0.9% before concluding that “it was impossible to say whether these apparent increases were an upward trend or a temporary fluctuation”, British Gambling Prevalence Survey, 2010.

²⁴ SINTEF Study, Gambling and Gambling Problems in Norway 2007, p.2

²⁵ WODC report: “Majority of the players uses self-control techniques”, p.50

²⁶ “Regulating Gambling in Europe – National Approaches to Gambling Regulation and Prevalence Rates of Pathological Gambling 1997 – 2010”, Simon Planzer (ed.), Zurich 2011 available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2045073

Country	Year	Screen	Percentage	Article
				<i>Icelandic version of the Problem Gambling Severity Index: A psychometric evaluation.</i> Paper presented at the 27th Nordic Psychiatric congress, Reykjavik, Iceland.
South Africa	2005	GA	1.4	Collins P., & Barr G. (2007) <i>Gambling and problem gambling in South Africa: The national 2006 Prevalence study.</i> National Centre for the Study of Gambling at the University of Cape Town.
USA	2000	DIS	3.5	Welte J., Barnes G., Wieczorek W., Tidewell M., and Parker J. (2001), Alcohol and Gambling Pathology among US Adults: Prevalence, demographics patterns and comorbidity. <i>Journal of Studies on Alcohol.</i> 62, 706-712.
Singapore	2008	DSM-IV	1.2	Ministry of Community Development, Youth and Sports (2008). <i>Report of Survey on Participation in Gambling Activities Among Singapore Residents, 2008.</i>
Macao	2003	DSM-IV	4.3	Ka-Chio Fong D & Ozorio B. (2005). Gambling Participation and Prevalence Estimates of Pathological Gambling in a Far-East City: Macao. <i>UNLV Gaming Research Review Journal</i> , 9(2), 15-28.
Hong Kong	2005	DSM-IV	5.3	<i>Study on Hong Kong People's Participation in Gambling Activities.</i> (2005) Key Statistics

The draft law mentions that online gambling inherently poses larger risks to gambling addiction due to, amongst others, a lower participation threshold and the lack of physical contact. However, the draft law overlooks the benefits provided by the internet and fails to recognize the unique monitoring and detection ability of online gambling providers as well as the efforts made by the online industry to prevent gambling addiction. The possibility of collecting and assessing the data gives the online sector an advantage in terms of detection and prevention. In an online environment, unlike other sectors, every step a customer takes is traceable. This information can be used to detect changes in a player's gambling behaviour that could potentially indicate the emergence of gambling related problems, giving operators the opportunity to intervene proactively (i.e. apply measures as cooling-off or self-exclusion). Detection of emerging problems is also possible through customer communication. A study carried out by Joerg Haefeli in 2010²⁷ showed that based on roughly 150,000 customer services contacts per month per operator, there are powerful indicators for at-risk gambling. The model applied in the study proved that it was able to identify 76% of all potential problem gamblers solely based on the analysis of their correspondence.²⁸

The draft law also seems to overlook the ability of players to manage their own behaviour when provided with the appropriate information and tools. Most clinicians, psychologists and gambling researchers agree that players should have the facility to set their own limits on gambling. Self-monitoring and the encouragement of personal responsibility is an important principle for all gamblers. The conscious act of decision-making about limits on the part of ordinary gamblers and problem gamblers alike is helpful in promoting personal responsibility and inducing the discipline of informed decision-making. Most gamblers of all types of intensity prefer voluntary rather than imposed protection systems.²⁹

Several established studies (Williams and West³⁰, Auer and Griffiths³¹, Wood and Griffiths³² and the Australian productivity commission³³) have found that voluntary measures, encouraging players to

²⁷ Early detection of gambling problems based on customer communication, By Joerg Haefeli, Suzanne Lischer and Juerg Schwarz, Lucerne University of Applied Sciences and Arts, December 2010.

²⁸ The impact of moderate gamblers falsely assumed to be at risk was minimal – 93.2% of all customers would be classified correctly.

²⁹ International Gaming Research Unit, The global online gambling report, ECOGRA 2007.

³⁰ Williams, Robert J., Beverly L. West, and Robert I. Simpson. *Prevention of problem gambling: a comprehensive review of the evidence and identified best practices.* Ontario Problem Gambling Research Centre and the Ontario Ministry of Health and Long Term Care, 2012: "opportunities for players to make choices about play and the use of use systems to manage their own money and time is a useful harm

make rational decisions about their gambling behaviour, even for problem players, are the most beneficial harm prevention strategy, whilst fixed tools do not encourage gamblers to manage and monitor their own behaviour.

These findings are also confirmed in the Dutch WODC report of March 2012, where it is held that:

- 1) player-buy in and understanding of their gambling behaviour is essential; and
- 2) Self-help tools are used by a large majority of players, notably up to 85%, to control their own gambling behaviour.³⁴

In summary, the international consensus amongst researchers and gambling harm prevention experts is that a system where the player makes a conscious and voluntary decision about spending limits for gambling is the best way to keep players safe and enable those at risk of gambling problems to enhance their sense of personal responsibility.

Online operators already offer a high number of protective measures to their players, in line with self-regulatory initiatives that complement licensing requirements and offer a consistent set of protection standards. A good example of such self-regulatory initiative is the CEN Workshop Agreement on "*Responsible Remote Gambling Measures*" which sets out 134 practical measures aimed at safeguarding a particularly high level of consumer protection and ensuring that remote gambling operators act and behave responsibly in the European Union (see Point II 1.2).³⁵

The table below indicates additional instruments of protective measures that cannot be guaranteed by the offline sector.

minimization strategy. This is because such systems encourage players to make rational decisions about their gambling and obliges them to retain these limits despite subsequent temptations that arise during play".

³¹ Michael Auer, Mark D. Griffiths, Voluntary Limit Setting and Player Choice in Most Intense Online Gamblers: An Empirical Study of Gambling Behavior journal of Gambling Studies Forthcoming 2013: "voluntary limit setting is the most beneficial harm prevention strategy... Company imposed upper mandatory limits can be easily circumvented by players and encouraging personal responsibility through a voluntary system is best... Externally imposed upper limits can have unintended consequences in that players can develop a false sense of safety and make increased bet sizes and indulge in greater time spent gambling".

³² Richard Wood and Mark Griffiths (2010) social responsibility in online gambling voluntary limit setting in world online gambling report volume 9 number 11 (available at <http://www.pc.gov.au/projects/inquiry/gambling-2009/report>): "imposed fixed limits do not encourage gamblers to manage and monitor their own behavior".

³³ Productivity Commission Inquiry Report on Gambling Volume 1 (26 February 2010), Professor Paul Delfabbro and others (http://www.pc.gov.au/__data/assets/pdf_file/0010/95680/gambling-report-volume1.pdf): "there is a consensus amongst international researchers that the use and encouragement of player induced rational decision-making systems is preferable even for gambling addicts (when not playing) over imposed systems that rely on monitoring. a system that allows players to make a rational choice is best Even if limits higher than the mandatory set levels were to be set by a gambling addict, the conscious act of setting these limits is beneficial. The committee concluded that limit setting systems should be offered on all gambling websites and venues".

³⁴ "Gokken in kaart. Tweede meting aard en omvang kansspelen in Nederland", Wetenschappelijk Onderzoek- en Documentatiecentrum (WODC) of the Ministry of Security and Justice, December 2011, B. Bieleman, S. Biesma, e.a., available at www.wodc.nl/images/volledige-tekst_tcm44-414592.pdf

³⁵ The European Committee for Standardization (CEN) Workshop Agreement (CWA 16259:2011), Responsible Remote Gambling Measures, January 2011 (available at <http://www.cen.eu/cen/News/PressReleases/Pages/ResponsibleRemoteGamblingMeasures.aspx>)

Figure 2: Protective measures for gamers in land-based and online gaming³⁶

Protective measures for gamers	Land-based gaming	Online gaming (cfr. CEN/ RGA Tech. Guidelines ³⁷)
Exclusion		
Partial exclusion from single types of games	not possible	widespread
Self-exclusion	widespread	widespread;
Prescribed exclusion	widespread	widespread
Limitation		
Limit to gaming volume	not possible	widespread;
Limit to gaming time	not possible	possible
Limit to gaming frequency	possible ¹	possible
Design of the gaming structure		
Succinct presentation of the gaming time	possible ²	widespread;
Succinct presentation of the gaming volume	not possible	widespread;
Succinct presentation of the gaming frequency	possible	Widespread;
Information offering		
Awareness material and responsible gaming advice	widespread	widespread;
Self-tests	possible	widespread;
Self-help tools	not possible	possible
Contact with qualified support structure	widespread	widespread;
Under-age protection		
Access limitations	possible (but with many forms of land-based gaming not implemented)	widespread;
Handling credit		
No award of credit	widespread	widespread;

The measures of self-limitation are designed to protect primarily at-risk players and those tools have been used primarily by those players. Furthermore, *“the vast majority of the gamers (88%) did not increase their limit once it had been set and, were able to reduce both their gaming frequency and volume, proving the effectiveness of the self-limitation feature”*.³⁸ According to the Dutch WODC report *“81% of the players with a higher risk of addiction use self-control mechanisms (e.g. maximum playing time and maximum amount). Among regular gamblers this is 85%”*³⁹. The report also underlines that *“a large majority of the interviewed recreational and players at risk use self-control techniques to control their own gaming behaviour. Of the players at risk, 15% have sought help for their gambling problem.”*⁴⁰

In addition, the raw source data⁴¹ that can be used in online gambling shows that gambling behaviour is determined by the interaction between the individual and environmental conditions. This means that a person’s gambling behaviour and any symptoms of a disorder that might appear can be modified in the course of a lifetime.

³⁶ Early detection of gambling problems based on customer communication, By Joerg Haefeli, Suzanne Lischer and Juerg Schwarz, Lucerne University of Applied Sciences and Arts, December 2010, p. 7.

³⁷ RGA, “Technical issues - Good practice guidelines for the remote gambling industry”, available at http://www.rga.eu.com/data/files/rga_technical_guidelines.pdf.

³⁸ Ibid. p. 6.

³⁹ WODC report: “Majority of the players uses self-control techniques”, p. 51.

⁴⁰ Ibid.

⁴¹ The Transparency Project, Division on Addiction of the Cambridge Health Alliance, available at <http://www.thetransparencyproject.org/>.

It should be also stressed that operators do not have any interest in creating problems for their customers. The aforementioned CEN Workshop Agreement is the evidence of all the measures put in place by online operators guaranteeing a safe online gambling environment.⁴²

1.1.3 Online registration, KYC and age control

Online gambling is subject to stringent customer registration and Know Your Customer (KYC) procedures. Contrary to what may be insinuated in the draft legislation that online gambling may be anonymous or poses increased risks due to the lack of physical contact, online operators do collect and process a wide variety of information from their customers, ranging from personal details such as name, address and data of birth, as part of the online registration and gaming account opening, to bank account information and the customer's digital footprint as part of his transactions with the operator (e.g. IP and MAC address).

Compared to offline face-to-face identification, the internet provides more sophisticated possibilities for age-controls based on the online registration process. The UK Children's Charities' Coalition on Internet Safety report 2010⁴³ often quotes the online gambling sector as a successful sector managing to keep children off their sites, and as an example that should be followed by other e-commerce industries. Mystery shopping exercises show as well that online age controls are more efficient than offline '*face-to-face*' identification.⁴⁴

Knowing your customers and providing only services to adult customers (+18y) is one of the core obligations of every online operator and is enshrined in a number of key compliance obligations contained in AML rules, gaming law or other legal requirements. Before gambling accounts are opened, each individual must, as part of the registration process, at least submit:

- Full name
- Registered address
- Data of birth

These data are cross-checked by the operator against information available to him, including additional information obtained through requests to the customer. While it cannot be excluded that somebody may open an account based upon false or inaccurate data, this is a fraudulent registration

⁴² See for example the European Committee for Standardization (CEN) Workshop Agreement (CWA 16259:2011), Responsible Remote Gambling Measures, January 2011 (available at <http://www.eesc.europa.eu/self-and-coregulation/documents/codes/private/143%20MARKT%202011%20CEN%20Responsible%20Remote%20Gambling%20Measures%20Workshop%20Agreement%20final%2016259-2011.pdf>)

⁴³ Briefing on the internet, ecommerce, children and young people, Children's Charities' Coalition on Internet Safety, November 2010

⁴⁴ A UK Gambling Commission mystery shopping exercise conducted in 2009 revealed that while 95% of online players had registered with operators that had no weaknesses in their underage gambling procedures, 98% of betting land-based shops allowed underage individuals to place a bet at the counter (available at <http://www.gamblingcommission.gov.uk/pdf/online%20mystery%20shopping%20programme%20july%202009.pdf>). A mystery shopping exercise conducted in 2009 by the Belgian consumer organisation (CRIOC) also revealed the lack of enforcement of age restrictions in the offline gambling market with an impressive rate of 71% of offline points of sale which were found selling illegally lottery tickets to minors (available at <http://www.crioc.be/FR/doc/x/y/document-4434.html>). For more information See also other studies from CRIOC in October 2009 (available at <http://www.crioc.be/FR/doc/x/y/document-4434.html>) and in April 2011 (available at <http://www.oivo-crioc.org/files/fr/5820fr.pdf>) and the British survey of children, the national lottery & gambling 2009 by Ipsos MORI, available at <http://www.natlotcomm.gov.uk/assets-uploaded/documents/Children%20and%20gambling%20-FINAL%20VERSION%20140709.pdf>

and will be considered as illegal. Furthermore, it should be noted that online operators themselves would be victim of poor KYC and registration solutions as this exposes them to an increased risk of fraud, e.g., chargebacks which is fraud committed against operators.⁴⁵

In addition to the strict internal identification and verification procedures of the online operators, Member States also impose various age and ID verification controls. In a number of Member States (Spain, Estonia, Belgium and Denmark), e-age and ID verification solutions have been made available (highly efficient but also heavily dependent on the availability of accurate (public) data for cross-check purposes).

EGBA and RGA welcome and support the recent view from the State Secretary of Public Health, Welfare and Sport Martin Van Rijn, as endorsed by [Thuiswinkel.org](http://thuiswinkel.org)⁴⁶, the national e-commerce association, in terms of the implementation of an e-ID mechanism and appropriate online age verification tools for the purchase of age-restricted products and services. Although the possibility of e-ID – or similar schemes - is currently not included in the draft law, EGBA and RGA invite the Dutch government to increase efforts and accelerate the implementation of online age and ID verification tools as part of its national Digital Agenda in a bid to make ID verification as efficient as possible and improve overall digital consumer protection and reduce the risk of fraud committed against providers of all information society services.

By the same token, the use of electronic verification technology as part of the digital registration process will equally increase overall user experience and support the channelling of Dutch consumers to Dutch online licenses.

1.2 Consumer channelling as key gaming policy success indicator

1.2.1 Introduction and general principles

The cornerstone of the Dutch government's proposal is to create a regulated gambling market which channels Dutch players away from non-Dutch regulated to regulated operators. Without a high rate of channelling it is impossible to meet other legislative targets of better protecting consumers and preventing crime as the majority of bets will not be placed in the Dutch regulated market. The effect of channelling has been proven to be important in other European Member States such as France, where a low rate of channelling has led the French regulator to conclude that they have been ineffective in preventing excessive gambling.⁴⁷ A high rate of channelling is also the most important factor in achieving a sustainable level of taxation from the online gambling industry. A high rate of channelling proves that Dutch regulated operators can adequately satisfy the online demand of their customers without them having to go to non-Dutch regulated operators with more favourable prices, promotions or returns. As a result there is more taxable revenue in the Dutch system and more sponsorship and advertising agreements are being made as a by-product.

⁴⁵ According to data made available by one member, the cost of fraud committed against the operator reduced in Denmark with +85% due to the introduction of the Danish eID solution (nemID).

⁴⁶ See www.thuiswinkel.org/nieuws/thuiswinkel.org-ontwikkeling-naar-eid-stelsel-goede-zaak.

⁴⁷ See in particular page 20 of the 2011 Activity Report of ARJEL "*le poids de la taxation*" (the weight of taxation): <http://www.arjel.fr/IMG/pdf/rappor-activite-2011.pdf> and the last paragraph of page 1 of the Best Wishes Letter of ARJEL for year 2013 <http://www.arjel.fr/IMG/pdf/2013-voeux-arjel.pdf>. Despite the fact that at the end of 2010, 48 licences had been granted in France, only 33 licences remained active at the end of 2012 for a total of 22 operators comparing to 35 at the end of 2011 and 41 at the end of 2010 (i.e. 19 operators less in two years).

To effectively channel demand, the Dutch government must ensure that the taxes, fees and levies applied to regulated operators are not overly burdensome and allow regulated operators to compete with non-Dutch regulated offers. In doing this, the minimum critical mass of consumption must be achieved (qualitatively expressed as % GW market share). Based upon experience in other countries, we believe the Dutch government is correct in saying that more than 75% of Dutch gambling must be channelled to newly regulated operators in order for this legislation to work. With 75% or more of Dutch gambling taking place within the regulated market, licensed operators will be able to attract customers and break-even on their investment, meaning that whilst returns for operators will be relatively modest, they are still likely to continue investing in the Netherlands.

If, the 75% is not achieved, newly regulated Dutch operators will not have a large enough pool of players from which to guarantee profit. This will lead to diminishing levels of investment, fewer regulated operators which are attractive to customers, and a reduction in regulated gambling overall. For the Dutch market, which is relatively small compared to Italy, Britain or Spain, it may even be argued that the minimum level of channelling should be well above 75% in order to be sustainable.⁴⁸

Based on independent research and experience in other countries, it is clear that a viable Dutch market is only sustainable if the total effective tax (including any associated costs, levies or fees) on operators is at – or below 20% GW. Therefore the further below the 20%, the greater the market share channelled into the Dutch market and the more successful the Dutch regulated market will become in achieving its policy objectives. H2GC refers to this affect as the creation of market equilibrium, where against global .com competition a win-win situation is created for all key stakeholders: consumer, state and operator.⁴⁹ This creates the following values:

- 1) **Consumer value:** the values for consumers to stay within the local licence scheme as their demands (product/choice/prices) are met. As consumer value locks the consumer into the national licence scheme, it is also in the interest of the government.

In this respect H2 make reference to the current dot FR market in France which does not include all product verticals, has a high tax rate based on turnover and onshore IT requirements that have led to only 25% of the value of French player remote gambling activity taking place within the scheme.

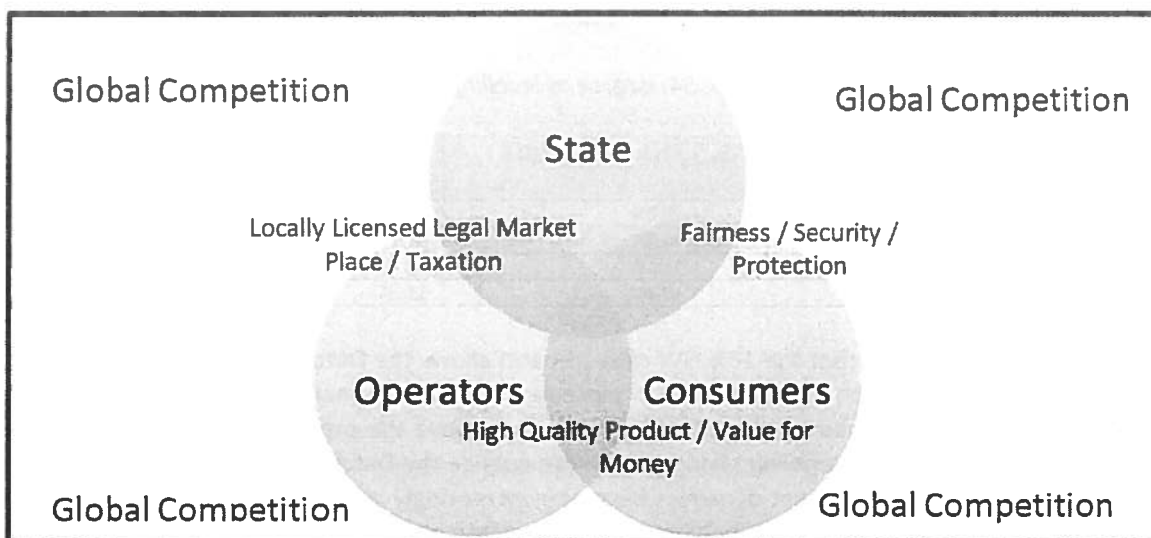
- 2) **State (government) value:** the ability to collect money directly from the operators (gaming tax) and indirectly via operator investment in local economy (media costs – additional benefits not explicitly included in the findings of this report).

Operator value: the ability to provide services in a sustainable manner over a longer period of time. If not, operators will not apply for licences or will be forced to withdraw from the market.

⁴⁸ Leakage of 1% in a smaller market (e.g. Denmark, Netherlands or Estonia) will have a bigger adverse distorting effect as in a bigger market (France, Italy, Spain, UK) due to the limited economies of scale.

⁴⁹ H2GC report on the Netherlands of February 2013

Figure 3: H2GC's The Equilibrium Remote Gambling Market (Win-Win-Win)



The “voluntary lock-in” of these 3 key stakeholders ensures that the online gambling market is stable (with only marginal leakage to non-Dutch regulated .com operators) and this creates positive market dynamics which support government policies to protect consumers and fight organised crime.

The Dutch policy objective to protect Dutch consumers will not be achieved under the current proposed legislation for three reasons:

- 1) The current policy ignores 25% of the Dutch gambling population (estimated to be 200,000 players) from the outset, making 75% channelling the “the best case scenario”. In our view, Dutch policy should have the ambition to channel as much demand into the regulated market as possible (+95%); and
- 2) The outlined total tax and cost structure of an estimated 27% GW (when included all associated costs, levies and fees) means the 75% cannot be achieved. Other countries have illustrated that the higher the rate of gaming tax and additional levies and fees (“total effective cost”) the less channelling is achieved and the less sustainable the gambling market becomes. The French licensed system has suffered a channelling rate of below 50% due to the excessive taxation burden on operators. The German and Greek online licensing schemes only exist in draft- or primary law with no channelling to local licenses.
- 3) The critical mass of consumption of 75% GW as a *condition precedent* for a viable .NL online licensing scheme is not met. This means that after year one, operators will reduce investments in order to try to control losses and remain in the licensed market. Other operators will simply withdraw from the market completely. This will decrease the consumer value proposition and negative market dynamics will continue to erode the licensing scheme from within. As a result, less Dutch consumers will be attracted to gamble on regulated Dutch sites and opt for the better “value proposal” in the global .com B2C global digital market.

In order to guarantee sustainable regulation and to ensure effective consumer protection the Dutch government must be more ambitious, both in the amount of channelling it wants to achieve and also the amount of operators it hopes to attract into the Dutch market.⁵⁰ This has been alluded to in the

⁵⁰ The more operators that can be persuaded to go for a local .NL license, the stronger the structural guarantee will be to control the offer outside the Dutch licensing scheme.

in the Memorandum and expressed by the Ministry of Finance.⁵¹ On request of the Ministry of Finance, H2 Gambling Capital⁵² has calculated the degree of channelling at different online gaming tax rates that it expects to be achieved in the Netherlands in the years 2015 - 2018.⁵³

Figure 4: Explanatory Memorandum p. 34: degree of levelling to be expected with various tax rates

Rate betting and gaming tax (GW)	Channelling 2015	Channelling 2016	Channelling 2017	Channelling 2018
10%	93.6%	95.0%	95.5%	96.0%
15%	84.9%	85.8%	86.5%	87.0%
20%	76.0%	76.1%	76.4%	76.9%
29%	65.0%	63.8%	63.2%	63.3%

From the table it is clear that the 10% GW rate-scenario allows the Dutch government to achieve its policy goals to ensure effective consumer protection through demand channelling in the most optimal manner. In comparison the 29% GW rate – just above the proposed total effective cost of 27% GW – results in 35% gambling taking place more outside the Dutch regulated market. This effect is a result of the eroding market dynamics becoming increasingly stronger. This leakage to the .com market would jeopardise the stability of the Dutch regulated market, notably as after the 1st year the Dutch online market already starts to shrink. We note that more recently the trends in taxation of online gambling lead to rates of 15% or below: Great Britain 15%, Belgium 11%, Latvia 10%, Finland 8.75% and Estonia at 5%.

Further support can be found in a December 2012 PWC report on online gaming taxes in Sweden. The report addresses and compares three online gambling tax models: a 20% GW tax model, a 15% GW tax model and a 10% GW tax model.⁵⁴ The conclusions of the PWC research confirms the view that a lower tax rate of 10% (in comparison to 15% or 20% GW tax rate) on online gambling will substantially increase customer channelling to Dutch regulated sites.⁵⁵

Figure 5: PwC report on expected effects of lower tax rates on channelling in Sweden (December 2012)

	% Channelling ⁵⁶ (exl. Lotteries)	2013 mSEK	2014 mSEK	2015 mSEK	2016 mSEK
Scenario 20% GW	~67%	827	915	952	1054
Scenario 15% GW	~76%	702	788	829	928
Scenario 10% GW	~88%	536	631	662	741

Furthermore it is worth noting that PWC holds that “over time a 10% tax will lead to the greatest tax revenues as this rate will ultimately sustain the highest proportion of the market being regulated

⁵¹ Page 34 of the English version, page 35 of the Dutch version of the Memorandum

⁵² H2 Gambling Capital is the leading industry consultancy firm. See Infra point 1.6

⁵³ In making this estimation, H2 Gambling Capital assumed that regulation of remote games of chance starts on 1 January 2015 and that no additional levy on remote games of chance is realised besides the games of chance levy and the games of chance tax.

⁵⁴ PWC, Regulation of online gambling in Sweden, Evaluating tax scenarios in order to define the best regulatory model for the re-regulation of online gambling.

⁵⁵ PWC, Regulation of online gambling in Sweden, Evaluating tax scenarios in order to define the best regulatory model for the re-regulation of online gambling, 4 December 2012, pages 46 to 54, conclusion on page 55.

⁵⁶ PWC uses the word “absorption” of consumption by the local licence instead of channelling of consumption towards the licence.

with a Swedish licence (channelled) and encourages higher levels of growth, including greater marketing spend, driving innovation in consumer value and development, than the higher tax scenarios".⁵⁷

1.2.2 Channelling in other EU Member States: learning from experience

In most cases, channelling consumers to national licences has become difficult and is often undermined due to:

- 1) A Limited product offering, notably the exclusion of entire product verticals from the licensing scheme, e.g. online casino or live betting; and
- 2) Sub-optimal, sometimes even poor, user experience, too rigid registration processes or unbalanced responsible gambling requirements chasing away customers to .com operators; and
- 3) Too high taxes/cost burden preventing the operator from being attractive enough in comparison to the .com competition⁵⁸.

1.2.2.1 France

While it may be argued that France achieved a general channelling ratio of around 55% in 2012, we have to point out that this image is somewhat distorted by the following factors:

- 1) French land-based monopolies (FDJ & PMU) continued to operate as retail monopolies and were allowed to leverage their core assets, notably their strong brand recognition and their liquidity, onto the online market by introducing new products. In calculating a more realistic percentage of channelling for present purposes should be limited to online activity only.
- 2) The very high channelling rate for liquidity driven games such as poker and horse racing is offset by a very low channelling rate for other products (betting ~25%), or even nil (0% online casino).

This relatively high channelling rate for French liquidity driven games (+85%) can be explained by the fact that:

- 1) Even though the national market is ring-fenced, the French stand-alone digital market is big enough to generate enough liquidity by itself in order to be able to offer good consumer value. In contrast in the Netherlands – just like in Denmark – the national market does not have that liquidity capacity on its own because of its relatively modest market size.
- 2) Gaming Tax on online poker is capped at 1 EUR per hand, making it very attractive to middle and high value players to stay within the scheme as the effective tax rate is not excessive⁵⁹.
- 3) Competition on horse betting is *de facto* impossible as the only form of betting in horse racing is pool betting and former monopolist *Pari-Mutuel Urbain* (PMU) has the biggest pool, and hence the prize money. This makes the PMU by default the "best consumer value bet" in the horse racing market driving channelling towards PMU.

⁵⁷ PWC, Regulation of online gambling in Sweden, Evaluating tax scenarios in order to define the best regulatory model for the re-regulation of online gambling, 4 December 2012, pages 46 to 54, executive summary on page 5.

⁵⁸ See infra figure 3: Comparative overview of cost structure online gaming taxes licences in EU Member States and P&L impact, and the EC Commission statement in the Danish online gambling tax case that 20% GW is the "point of no" return.

⁵⁹ See infra in terms of VIP and middle value players that must be locked into a local licence scheme to get the required critical mass of consumption and scale

- 4) Despite the fact that at the end of 2010, 48 licences had been granted in France, only 33 licences remained active until the end of 2012 for a total of 22 operators comparing to 35 at the end of 2011 and 41 at the end of 2010, underlining the difficulties of the French market⁶⁰.

The French gambling authority (ARJEL) often stresses that the heaviness of the taxation level and inconsistency of tax basis in France lead to an uneconomical market which creates an environment that is ineffective for achieving the objective of preventing excessive gambling⁶¹. These observations are supported by the June 2013 report from the French regulator ARJEL⁶² where it is acknowledged that 38% of the entire gambling population and 50% of all problem gamblers still plays on non-French licensed sites (.com operators).

1.2.2.2 Italy

While Italy displays relatively good growth in its regulated market, we must point out that the licence conditions do not capture live betting. This has led to a channelling level of circa 25% and a decrease in gross winnings for sports betting in 2011 with 71%. Furthermore, when more products with lower taxation were introduced, the channelling effect in Italy increased. By way of comparison, 70-75% of all money spent on online casino gaming was estimated as being made with non-Italian regulated operators rather than Italian-regulated operators before online slots were introduced as part of the local casino offering.⁶³ To illustrate this we quote statements on the Italian online gaming market conditions by an analyst and two online gaming executives in the press recently:

- *“Paddy Power Italian business remains loss-making after it invested €20.5m*

Analysts agree the competition and size of the Italian market will make it a “hard slog” for Paddy Power. Nick Batram, an analyst with Peel Hunt, said: “It is attracting decent market share but having to spend a lot of money of money to do so. It’s tougher than the market is making out.”

- *Chief executive Ed Ware admitted growth in Italy – where the operator launched last November ahead of the rollout of dot.it slots the following month – has been “slower than expected”, with just £500,000 in revenues derived from the jurisdiction. Consequently, “higher than expected start-up losses” are expected from the Italian operation.*
- *Betsson chief executive Magnus Silfverberg has admitted the operator has found it “tougher than we thought” to gain a foothold into the Italian e-gaming market.”*

1.2.2.3 Denmark

While Denmark can be applauded as being a more sustainable licensing framework, the real degree of channelling that is achieved remains to be unveiled. While the Danish Gambling regulator opinions that 95% of the market was channelled, it did not provide any evidence to support this

⁶⁰ See activity reports 2010, 2011 & 2012: [//www.arjel.fr/-Communiqués-de-presse-.html](http://www.arjel.fr/-Communiqués-de-presse-.html)

⁶¹ See in particular page 20 of the 2011 Activity Report of ARJEL “*le poids de la taxation*” (the weight of taxation): <http://www.arjel.fr/IMG/pdf/rapport-activite-2011.pdf> and the last paragraph of page 1 of the Best Wishes Letter of ARJEL for year 2013 <http://www.arjel.fr/IMG/pdf/2013-voeux-arjel.pdf>

⁶² <http://www.ofdt.fr/BDD/publications/docs/eftxmtt6.pdf>

⁶³ PWC, Regulation of online gambling in Sweden, Evaluating tax scenarios in order to define the best regulatory model for the re-regulation of online gambling, 4 December 2012, paragraph 4.2, p. 26

outcome. In contrast, a certain part of the market⁶⁴ holds that *only* 68% of the Danish market (excluding lotteries) has been channelled due to the total effective gaming tax of ~25% GW⁶⁵, a partial product scope and sub-optimal user-experience.

The view that Denmark may only have a limited degree of channelling (68%) is further corroborated by the fact that:

- 1) The EU Commission established that 20% GW gaming tax is the “*rate of no return*”⁶⁶;
- 2) Since launch on 1 January 2012, 25% “for non-Danish regulated” operators surrendered their local Danish licence and stopped .DK operations as they had become economically unsustainable⁶⁷;
- 3) Fourteen .com operators are black-listed (i.e. the number of black-listed operators is almost 60% of the .com operators that initially applied for a local .dk licence);
- 4) Advertising for non-Danish licensed operators continues, notably in online media spaces, affiliates⁶⁸ and using Search Engine Optimisation (“SEO”) to by-pass restrictions.

1.2.2.4 Spain

In Spain, initial indications show that a channelling level of 60% has been achieved with 25% tax. This has led to several poker operators indicating that they would surrender their national licences and exit the market due to economic unsustainability within a year of the market opening.

Concluding and based on the above Denmark may seem to be a good model from a channelling/consumer protection perspective in comparison to France or Italy, it still does not necessarily make the Danish model attractive and good enough compared to global .com competition. From this point of view, Denmark with a gaming tax of 25% RGW, restricted product scope and somewhat rigid user experience⁶⁹ is far from optimal, nor is it the most efficient from channelling point of view.

1.2.3 Conclusions and online industry recommendation

Denmark may indeed seem a good initial benchmark from a channelling/consumer protection model when compared to France or Italy. From that viewpoint, the Danish model should be supported and certain particular points must be endorsed. However, the Danish licensing model is far from perfect and improvements to optimise channelling in a competitive global .com market should be made. Most importantly this can be improved by lowering the effective tax rate on online gambling. Gaming tax of less than 20% allows all product and increases user experience. Against the

⁶⁴ Also see the December 2012 PWC report on online gambling taxes in Sweden, H2GC country report on Denmark and views from Danish market leaders

⁶⁵ Due to inclusion of bonuses in the taxable basis, creating an inflating effect of ~5% (based upon average industry bonus spend of 20%), also see infra on bonuses

⁶⁶ See para 135 and 136 of the decision of the European Commission: “Conclusions reached by the Danish legislator confirmed by studies and the evidence from other European markets is that a 20 per cent tax of GGR (Gross Gaming Revenue) *“is the highest rate economically feasible, a higher rate would be the ‘rate of no return’”*

⁶⁷ 8 out of 32 operators

⁶⁸ A ten-minute desktop review reveals that certain Danish affiliates such as www.spilpanettet.dk/bedsteodds, or www.tips-oddset.dk/Casino.html refer Danish online gamblers to .com operators that continue to provide services to local residents without a Danish licence, such as www.winner.com/da/ or www.10bet.com

⁶⁹ For instance on rigid gaming session log-in requirements, where more user friendly are available with equivalent verification functionality

experiences gained in other Member States, we encourage the Dutch policy makers in the shaping of their own Dutch licensing model to take these learnings on-board and to go beyond the Danish benchmark and to optimise channelling of all Dutch Consumers.

Although on first sight the 75% channelling seems satisfying and leading to acceptable results, a higher channelling rate leads to both i) more optimal consumer protection as it includes more (nearly all) Dutch consumers and ii) and a more sustainable yearly tax revenue as the regulated online market is stable, successful and growing in size (win-win equilibrium). Therefore to make sure that policy objectives are met most effectively we recommend the government to focus as much as possible on channelling of gambling consumption to Dutch remote gaming licences based upon global digital market reality and consumer demand.

1.3 Calculating the total effective tax burden of the Dutch licensing scheme

1.3.1 Introduction and general overview of total effective tax burden

The draft legislation introduces a staggering total of eight separate cost elements for prospective licensees:

- 1) Gaming tax of 20% GW (excl. bonuses)
- 2) Indirect (hidden) gaming tax of ~5% GW on bonuses
- 3) Regulatory (KSA) Levy of 1.5% GW
- 4) Unspecified contributions to a remote gambling fund
- 5) Unspecified contribution to a central register for self-exclusion
- 6) Unspecified contributions to justice and security
- 7) Unspecified licensing costs: annual and application fees
- 8) Unspecified contributions to charity and sports

These costs do not only define the direct operator *cost of doing business* under a Dutch licence, but equally define the financial *value proposal* to the end-customer, as expressed notably by the Pay-Back Ratio (PBR, price money, Return to Player or in Dutch: *uitkeringspercentage*).⁷⁰ For a Dutch regulated operator to be able to successfully compete with the .com operators targeting the Dutch market, the pay-back ratio must be at least 90%^{71,72}. If this is not the case, the end customer – in particular the very price sensitive value players representing more than half of the total number of online players (often holding accounts with several online operators) – will stay out of the Dutch licence scheme and continue to gamble with an online .com operator of their choice.⁷³ Reducing the PBR to absorb increased costs is not recommended and completely undermines primary policy objectives.⁷⁴

⁷⁰ See also *infra* on online business/ consumer value model, P&L structure and why PBR cannot be reduced.

⁷¹ The average PBR across all products will be circa 95%, with higher PBRs for casino, poker, betting exchanges and live betting (97-98% BPR).

⁷² As indicated elsewhere the best warrantee to fight the non-Dutch regulated offer is to ensure an attractive equivalent. Experience in other jurisdictions has equally exposed the limited effect – if any – of the blocking of internet traffic (ISP) and payments (PSP).

⁷³ See also *infra* regarding experiences in the UK, the reform of the Gambling Act 2005 and the increased price sensitivity of online customers.

⁷⁴ See also *infra* on online business/ consumer value model, P&L structure and why PBR cannot be reduced.

While the online industry understands and supports the reasonable allocation of certain direct online industry specific costs to licensed online operators, it submits the following:

Costs:

- 1) Cost must be incurred in an efficient, transparent and proportionate manner. Costs should further not be used as an excuse to create or maintain overhead or administrative red tape without generating a clear and material benefit to underlying policy objectives;
- 2) Cost should only be covered by the industry to the extent that the costs are directly and exclusively attributable to risks related to the online industry. Costs of treatment of online gambling may be specific enough and are eligible for coverage. However, generic costs of health care should not be covered

Operator Contributions:

- 1) The operator contributions must be cost- and expenditure based, and not in function of operator revenue (GW), e.g. an additional percentage of operator GW. In other words, contributions must cover the real costs of the risk remedy/policy measure, and not be a hidden levy, financial reserves or similar form of state income.

Furthermore, EEA established licensed operators, like any other corporate entity, pay all taxes due within the EEA framework, notably VAT, cost of employment, corporate- and other tax⁷⁵. Moreover, as the EU online industry does already pay sector specific gaming taxes, we hold that these gaming taxes should cover the specific costs that are associated with the identified industry risks. It is for the government to decide – as part of its policy making and budget process – how it allocates the collected tax moneys to the various different policy objectives.

1.3.2 Cost sensitive online consumer industry and channelling

On several places in the Explanatory Memorandum, it is stated that the total tax and cost burden may undermine the stated Dutch policy objectives and a cost-cautious bottom-up approach is therefore recommended.

On page 75 of the Explanatory Memorandum, for instance, it is stated that:

“For high costs stand in the way of a suitable and attractive legal supply that should prevent players from participating in illegal remote games of chance which do not offer the high level of protection - also against gambling addiction - of legal remote games of chance”

Hence, the Dutch policy maker explicitly acknowledges that a too high cost-structure will destroy consumer value in the Dutch licence scheme and makes it less attractive and it undermines the channelling objective and the primary policy goal ensuring effective consumer protection. Besides

⁷⁵ It is noted that the standard corporate tax rates applicable in EU licensing jurisdictions is equivalent to the Dutch corporate tax rate of 25% (United Kingdom 23% and Malta 35%). According to a report of Deloitte the Effective Tax Rate (ETR) of a Dutch multinational is between 8% and 20%, and in the Netherlands there are no withholding taxes on interests and royalty payments, or capital gains tax available at [http://www.deloitte.com/assets/Dcom-Azerbaijan/Site%20SMF/EN/Events/The%20Netherlands As%20an%20Intermediary.pdf](http://www.deloitte.com/assets/Dcom-Azerbaijan/Site%20SMF/EN/Events/The%20Netherlands%20an%20Intermediary.pdf). Under the so-called “innovation box” and to stimulate R&D in an international context, an effective tax rate of 5% is applicable for revenue derived from certain intellectual property rights.

the effective achievement of policy objectives, a proper understanding of the typical online industry structure of profit and loss ("P&L") and knowledge of consumer behavioural dynamics (important in equal market access conditions for Dutch online operators and their .com competitors) is essential. In principle taxes and other costs should only be imposed in their function of the financial capacity of the business to consumer ("B2C") value model.

As will be explained below, the online gambling model prime objective is to maintain as much consumer value as possible (and entice and lock in consumption under the regulated .NL licensing scheme), which makes it very susceptible to any kind of costs. Even a marginal increase of costs on the digital B2C service industry with, for instance 1-2%, leads to a disproportionate negative effect on digital consumer as operators can no longer invest these 1-2% in ensuring a competitive consumer value proposition. If consumers have the better .com value offer available "with just one click away"⁷⁶, they will choose a more attractive offer.⁷⁷

The non-linear relationship between costs and consumer value is also recognised in the EC's decision on Denmark. In paragraph 134 of its decision, the European Commission stated that

"If the tax rate is set at a higher level (i.e. 25 per cent) the pressure on pay-out rates may be expected to be bigger and the positive revenue consequences of a 25 per cent rate may therefore turn out to be lower than those of a 20 per cent rate."

Within the context of the on-going review of the Gambling Act 2005 in Great Britain, support is growing that "there is more sensitivity in prices online than there is in retail. The large majority of online customers are more price sensitive. They tend to be slightly more sophisticated and that the main challenge online is winning and retaining customers". Indeed, online customers often have four or five accounts across different operators and there is little brand loyalty in the market. To address this online operators are continually competing to grow and to maintain market share through higher pay-out and increasing customer experience (e.g. higher pay-back ratio and more bonuses to increase value for money and customer retention).

In the historical .com single EU article 49 licence model, global consumer scale due to the cross-border nature of new technologies and low cost structure (single licence and low .com gaming taxes) enabled sustainable business by generating premium consumer value due to high payback margins (consumers received greater value for their money). The process of national (re-)regulation towards .local, with the associated digital market fragmentation⁷⁸, limited consumer scale, duplication and increased costs structure⁷⁹, challenges the sustainability of national .local models as such (characterised by low gross profit margin (5%)), material investment in marketing and customer retention (premium products, premium user experience and bonuses as part of the customer acquisition and retention strategy). In .local most operators - if not all - pay the increased gross win

⁷⁶ See infra point 2.1.4 on digital technologies empowering consumers to make their best choice in a more mobile and transparent digital global market place.

⁷⁷ Blocking of ISP and PSP does not work and with modern technologies, more and more VPN's or similar technologies are used so that the offer-consumption is no longer relying on traditional web server-client ISP technology (e.g. mobile internet and apps).

⁷⁸ According to European Policy Centre (EPC) research, there is a cost of not having a European Digital Single Market. Europe could gain 4% GDP by 2020 by accelerating its development. Based on expected 2010 GDP for EU27, this corresponds to a gain close to €500 billion or more than €1,000 for every citizen. A fragmented regulatory framework is blocking innovation and entrepreneurship. As a result, Europeans are not enjoying the full benefits of the digital economy (cross-border online trade is low, ICT usage is low, and there are few global EU digital firms), Key findings of its Digital Single Market project, April 2010

⁷⁹ Initial cost of compliance, including development costs of platform to local license conditions and license applications (set-up) can be estimated as follows: France 8.7m EUR, Italy 2,5m EUR and Denmark 2.1m EUR.

gaming tax out of their own profit margin in order to maintain the same pay-back ratios and to ensure an equivalent to the .com competitive service offer/value proposition to their customers. The benchmark for competitive and equal market access conditions and the competition to attract/channel Dutch consumers to a Dutch licensing scheme is above all the standards in available the global .com supply and the benchmark is not in the land based Dutch product led market.⁸⁰

While the P&L numbers in the Figure 6 below can be adjusted, it is generally accepted and recognised that:

- 1) As in any highly competitive non-tangible e-commerce service industry, marketing and branding are very important to establish consumer trust as key business driver⁸¹. In contrast, in retail land-based models consumer trust is also generated by the physical presence and the tangible nature of the offer provided. As a result, there is a need to invest more in digital brands in the online gaming industry than there is in retail brands (marketing).
- 2) There is an absolute need to maintain high pay-back ratios (PBR of +95%) to offer a competitive (price) offer, in particular to attract and keep price sensitive players such as middle- and high value players. While these value players represent only 20% of the gambling population, they represent +50% of the market value (GW) (for higher value players this can even be 75% GW). If this segment of players (20%) cannot be attracted to Dutch online licensees, e.g. due to limited PBR or sub-optimal user experience, less than 50% of the market (GW) will be channelled. It will then become impossible to reach the financial targets of the Coalition Agreement⁸² or have enough critical mass in the online licensing scheme to sustain.

For instance, experience from the online gambling industry has shown that the PBR can also be affected by differences on a product level (e.g. roulette with single or double zeros) and that a particular game with a PBR that is 2.7% higher than an almost identical game is 12.5x as popular with the players.

Reducing the PBR⁸³ to finance the increased gaming tax should be discouraged as it has a direct negative impact on consumer value (both on the level of financial return and secondary products due to product market fragmentation). Theoretically it could be argued that operators could simply reduce the PBR to pay up for the increased tax and costs. Reality is however that this is not possible as such a reduction would need to be material and therefore has a direct adverse effect on consumers' winnings.⁸⁴ Financing increased gaming tax paid from reducing PBR would indeed significantly reduce customer value and would have a material adverse impact on channelling on the majority of customers – who are price sensitive.⁸⁵

⁸⁰ In contrast to a digital market where consumers have greater choice, better information with increased consumer mobility and increased competition, in a retail and-based market they are confined to the product offer available within their geographical area. Customers are then obliged to choose between the product-offer available, irrespective of how good or bad it is

⁸¹ See notably the page 19 of the 2012 EU Consumer Markets Scoreboard, tracking tracks the performance of 50 consumer markets using indicators such as comparability of offers, trust in retailers, problems, complaints, satisfaction, switching and choice

http://ec.europa.eu/consumers/consumer_research/editions/docs/8th_edition_scoreboard_en.pdf

⁸² 25m EUR in 2015 up to 31m EUR by 2018, see infra point 1.5.1

⁸³ In Dutch: *uitkeringspercentage*.

⁸⁴ This industry view is contrary to the assumption of the Boston Consulting Group in their 2011 report, where BCG holds that operators above all will protect their net profit line and finance increased costs by reducing the price money to players/pay-back ratio (BCG, slide 30).

⁸⁵ This will notably be the case for VIPs and middle value players who represent +60% of the market. The same can be said about poker, or other P2P products, as rake increases fundamentally changes the mathematics of

While for fixed odds sports betting the margin and pay-back ratio is equally defined by the outcome of the event on which a bet is taken, for poker and casino games in particular only the PBR defines the value returning to the customer.⁸⁶ Even seemingly small differences in PBR can have very substantial effects from the point of view of consumer value and returns on monies staked. For example to spend a total amount of 100 Euros on gambling, a customer can bet 75 times (in theory) if the payback ratio is 95% but only 30 times (in theory) if the payback ratio is 75%. With mathematical certainty, it must be acknowledged that with a PBR of 95% compared to 75%, the customer value, as expressed in turn-around and games played, is 2.5 times as high and increases with 150%. In other words, an increase with the PBR of 20% from 75% to 95%, leads to an increase in customer value of 250%.

In addition, operational and product implications must be considered as factoring in gaming tax on product pricing level will lead to a fragmentation of the digital product market, which will create secondary collateral damage for example in terms of open international liquidity for pooled games such as poker, pool betting or progressive jackpots, and the need to develop new games based upon new mathematical models. Fragmentation of the product market will be most visible for poker and casino games that are based upon a mathematical mode, such as for instance, slots. The core of every slot game is the underlying mathematical model defining besides PBR, the variety in the frequency and level of winnings⁸⁷. If the core PBR parameter in the mathematical model is changed, the entire model must be changed, leading to the de facto creation of a new casino game. While the external presentation of the game may be the same, the underlying game fundamentals and mechanics will be completely different due to the changed PBR. Customer will not only notice this directly, and refrain from playing; it can be safely assumed that product suppliers will not re-engineer their products for a relatively small Dutch market. The absence of premium casino products will strengthen and accelerate the reduction in the value of the product for consumers. If PBR for casino games are changed it will be impossible to have an attractive Dutch equivalent product offering.

For these reasons, and because marketing costs (35%) and other OPEX⁸⁸ (35%) can be optimised as part of efficient cost control, such an exercise will be at most a single digit number (and save for instance -5% other costs) to ensure that the overall ecosystem of sustainable offerings based upon optimised consumer value is not destroyed. Hence, to maintain an attractive consumer offer in a highly competitive global digital market betting duties are pre-dominantly paid from the net profit of the operator (PAT margin⁸⁹). Compared to traditional .com P&L, any additional increase of gaming tax with 10% GW (or equivalent) amounts to circa 33% on the profit line before standard corporate

the game and with the small margins that better players have, even smaller fee increases would mean that most winning players turn into losing players overnight.

⁸⁶ A difference between product PBR is based upon the nature and margin of the product itself:

- Sportsbook (fixed odds): Wins and losses broadly correlate with the house margin built in. Generally, to win big you need to stake big
- Casino: Lower margin means high payback to the customer. This payback to the customer is made up of regular small wins and irregular big win, with the big wins providing the attraction for customers to continue playing. Generally, one does not need to stake/bet big to win big

⁸⁷ Most international .com operators have in general over +200 different online (casino) games, most of these individual games with their own underlying mathematical model.

⁸⁸ These are indicative numbers and variations may exist between different online operators, in function of strategy, markets or other factors. OPEX includes, but is not limited to investments in ICT infrastructure, gaming platform, product licence fees, fraud committed against operators, negative financial results e.g. caused by negative margins in the bookmaker's book as "*favourites win*", offices, cost of compliance, salaries and related, etc.

⁸⁹ PAT stands for Profit after Tax.

taxes are accounted for. In other words, a gaming tax of 20% GW has the same effect as an additional corporate tax of 65-70%. A gaming tax of 30% GW amounts to circa 95-100% additional corporate taxes, implying that at this gaming tax rate it becomes punitive to operate, a challenge for operators to break even or worse still to avoid becoming loss making. .

A comparative P&L review of the gaming tax costs of local licences within the EU (fig. 6 below) shows – against the policy pre-condition to maintain equivalent consumer value and an attractive overall offer that is competitive to .com – that in EU member states with an effective gaming tax cost of +30% GW⁹⁰, licences cannot be sustained as operators are incurring losses. This will either force operators to stay outside the market (remain .com) or surrender licences as to stop their losses. This “negative before you start” impact is best seen in French, German and Greek⁹¹ licence schemes, where high taxes/cost structures make it impossible to maintain basic consumer value and reduce consumer channelling as This view is supported by the EC’s conclusions that the Danish gaming tax rate of 20% GW is the “rate of no return”.

Figure 6: Comparative high level overview of cost structure online gaming taxes licences in EU Member States and indicative P&L impact

	Gaming tax ⁹²	Marketing ⁹³	Opex (incl D&A) ⁹⁴	PAT Margin
Malta	0.5	35.0	35.0	27.9
Estonia	5.0	35.0	35.0	23.6
UK	18.0	35.0	35.0	11.3
Denmark	24.0	35.0	35.0	5.7
Italy	28.0	35.0	35.0	1.9
Spain	36.0	35.0	35.0	-6.0
Greece	40.0	35.0	35.0	-10.0
Germany	55.0	35.0	35.0	-25.0
France	56.0	35.0	35.0	-26.0

1.4 20% GW tax and bonuses: Explanatory Memorandum & Coalition Agreement

1.4.1 The Coalition Agreement & effective tax pressure lotteries

The Explanatory Memorandum refers to an online gaming tax of 20% GW, excluding bonuses the Dutch Coalition Agreement stipulates that an additional net revenue from online gambling tax must be collected according to the following timetable:

- FY 2015: 25m EUR
- FY 2016: 28m EUR

⁹⁰ As indicated elsewhere in this response, our educated best estimate is that the total effective tax/cost structure for Dutch licensee will be +27% GW.

⁹¹As with Germany, we note that the initially proposed Greek re-regulation has come to a standstill and channelling to operators other than the local monopoly OPAP is ‘nil’.

⁹² Based upon GW, and measured as total effective tax, e.g. including costumer bonuses or similar.

⁹³ Including mainly purchase of third party media (TV, radio, print, digital media), affiliates, sponsorship or similar.

⁹⁴ If Opex includes D&A, it may even be higher than 35% (ca. 40%).

- FY 2017: 31m EUR
- FY 2018: 31m EUR

From the outset it must be underlined that the Coalition Agreement:

- a) Does not define the taxable basis, but merely refers to 29% without clarifying the taxable basis, including possible exemptions for tax free winnings as is the case for lottery winnings; and
- b) Does stipulate that the total effective cost burden for operators shall not increase (In Dutch: *geldt niet als lastenverzwarend*).

These two observations are important as the current gaming tax regime for lotteries, converted to GW is less than 10% GW in effective tax pressure. In a letter⁹⁵ from Holland Casino to the Dutch State Secretary of Finance it is revealed that the tax scheme for lotteries (29% taxes on consumer winnings above 454 EUR) converted to a GW basis is on average around 10% GW (no tax exemption) and in some cases even less than 5%. We understand these numbers are very much in line with the outcome of an internal industry benchmark exercise. To obtain the same gaming tax revenue (bottom line contribution to State budget) the current lottery system converted to a GW model is below 10% GW effective tax pressure (which seems only logical as a broader tax basis must lead to a lower percentage to get the same tax income in EUR).

1.4.2 Bonuses

Bonuses are a well-established practice within the online gaming industry and a key element of customer acquisition and retention. Bonus percentages across the industry are estimated to be around 20% of an operator's margin.

The reasons why bonuses should not be included in the taxable base are as follows:

- 1) Bonuses and similar promotions are a real cost for operators, which has to be accounted for in line with International Financial Reporting Standards ("IFRS");
- 2) Bonuses do not in reality increase the gross win for customers because they are effectively gambling with money provided by the operator without a direct economical counter value for the operator. Hence, bonuses create a bubble effect by inflating the actual gross winnings.
- 3) The operator has already paid gaming taxes once on these funds, so including bonus money in the taxable basis would imply a second round of taxation when operator funds are re-used as bonus money ;
- 4) Bonuses given to players have a financial value (EUR) from the moment they can be withdrawn to the players' bank accounts;
- 5) Contrary to general marketing expenditure and other customer incentives, bonus money can only be used to gamble and generate taxable GW. Free drinks cannot be staked at the casino table but can only be drunk.

How bonuses increase customer value – in a similar manner as free food and beverages in a land based environment – is best illustrated with the following example. A Dutch resident opens an account with a Dutch licensed operator and received a sign-up welcome bonus equivalent to his first deposit into his player account. Bonus conditions stipulate that he has to turn the bonus 3 times around before the bonus can be withdrawn from the player account.

⁹⁵ Letter of Holland Casino to State Secretary of Finance 1 March 2013, p.3

Figure 7: How bonuses increase customer value

Step	Description of activity	Player account balance	GW
1	Creates an account at .NL operator	Nil	Nil
2	Deposits 50 EUR into gaming account	50 EUR	Nil
3	Receives sign-up bonus equivalent to 1 st deposit (i.e. 50 EUR)	100 EUR	Nil
4	Places a 1x2 football bet and loses, (margin of 5%)	50	50
5	Places a 1x2 football bet and wins (odds 1.4)	90 (50 staked +40 price money)	10 (50-40)
6	Places a tennis bet and backs the favourite (i.e. likelihood that he wins are high and odds are low e.g. 1.1)	95 (staked 50 + 5 price money)	5
7	Player withdraws 95 EUR	0 (nil)	5

In this example, an operator has paid 50 EUR in bonus money to a player, who after turning it around 3 times, generates 5 EUR GW. At 20% GW gaming tax this leads to 1 EUR in gaming tax. The total cost of the operator is 91 EUR, consisting of 50 EUR bonus money, 1 EUR gaming tax and 40 EUR price money, but at the same moment, the operator only receives 50 EUR from the player leading to a net loss of 46 EUR.

From a policy point of view, the inclusion of bonuses in the taxable basis counters the primary policy objectives of the Dutch regulatory regime:

- Channelling will be undermined since operators – due to the fact they have to control their costs – will lower their bonus expenditure and provide less incentives for consumers to register under a .NL customer account (less consumer value compared to .com);
- The total .NL online market will be smaller and hence, from a macro-economic point, more difficult to reach tax yield objectives due to increased leakage;
- Increasing the total effective tax rate with circa 4-5% on GW will jeopardise the economic sustainability of the local licence scheme, increase the leakage and accelerate the shrinking of the market.

Denmark proves to be a notable case study where due to the indirect inclusion of bonuses in the GW taxable basis:

- 1) The effective tax rate is ~25% GW (and not 20%), hence beyond the “rate of no return” as mentioned in the European Commission decision on state aid;
- 2) Consumer channelling to .DK is limited to ~68% mark (excluding lotteries).⁹⁶

In the Netherlands, we agree with H2GC that the inclusion of bonuses in the taxable basis will lead to an increased effective gaming tax rate of 25% GW⁹⁷ and thus an effect that is reducing the channelling to below 70%⁹⁸, which is below the critical market mass and the current – not too ambitious – policy objective to channel 75% of the market. And finally, if bonuses are considered as mere marketing costs, then why are other marketing costs not also subject to gaming tax? Because these marketing costs should not be taxed to begin with.

⁹⁶ PWC, Regulation of online gambling in Sweden, Evaluating tax scenarios in order to define the best regulatory model for the re-regulation of online gambling, 4 December 2012, page 37 Figure 4.8.

⁹⁷ Excluding other costs such as the Regulatory levy (1.5% GW) or contributions to certain funds

⁹⁸ According to H2GC, channelling will be reduced to 67%. H2GC presentation, 10 June 2013, Gaming in Holland

1.5 BGC 2011 and H2GC February 2013 report on the Dutch Market

The most authoritative source of information is by far H2GC⁹⁹. H2 works for all types of operators in the industry (land-based, online, state, private, monopolies, etc.) and is generally recognised as the most authoritative source by the financial analyst community and leading consultancy firms such as PWC and Boston Consulting Group (BCG), as well as public bodies and institutions at the European Union and national levels. As acknowledged in the Consultation Document, also the Dutch government and BCG have used H2 as part of their preparatory work.

On 15th of February 2013, H2GC updated its standard Dutch market report as part of standard reporting procedures. Besides the existing tax models of 29% GW and 15% GW, it included a 20% and 10% GW tax model. The report and its different scenarios can be summarized in the table below. It should be noted that the data below include numbers (both for channelling and for gross win) of the total Dutch licensed market (.NL), including online lotteries.¹⁰⁰

Figure 8: H2GC different tax scenarios for Dutch online gambling

Online GW gaming tax (m EUR) and channelling to .NL Scenarios				
H2 Report 15 February 2013 NL license scheme	GW10%	GW 15%	GW 20% ¹⁰¹	GW 29%
FY 2015 - 25m				
Channelling .NL	93.6%	84%	76%	65%
.NL Market seize	287.1m	248m	206m	170m
Tax income	28.7m	37.2	41.2	49.3
FY 2018 – 31m				
Channelling .NL	96%	87%	75.5%	63%

⁹⁹ Available at www.h2gc.com

¹⁰⁰ For a detailed breakdown, it is recommended to consult the source data as presented in the report. For more questions, please email info@h2gc.com.

¹⁰¹ On 5 July 2013, H2GC updated its report on the Netherlands and the 20% GW scenario, revising slightly upwards the total .NL gaming market from 212m EUR in 2015 (74.5% channelling) to 232m EUR in 2018 (75.5% channelling).¹⁰¹ PWC, Regulation of online gambling in Sweden, Evaluating tax scenarios in order to define the best regulatory model for the re-regulation of online gambling, 4 December 2012, page 37 figure 4.8.

¹⁰¹ Excluding other costs such as the Regulatory levy (1.5% GW) or contributions to certain funds

¹⁰¹ According to H2GC, channelling will be reduced to 67%. H2GC presentation, 10 June 2013, Gaming in Holland.

¹⁰¹ Available at www.h2gc.com

¹⁰¹ For a detailed breakdown, it is recommended to consult the source data as presented in the report. For more questions, please email info@h2gc.com.

¹⁰¹ On 5 July 2013, H2GC updated its report on the Netherlands and the 20% GW scenario, revising slightly upwards the total .NL gaming market from 212m EUR in 2015 (74.5% channelling) to 232m EUR in 2018 (75.5% channelling).

.NL Market seize	326.3m	278m	225m	180.2m
Tax Income	32.6m	41.7	45	52.2

We further note that when H2 refers to 20% gross winnings including bonuses, they already factor the additional cost of bonuses into the 20% gaming/tax costs. If H2 were to exclude bonus from the GW cost structure, the net gaming tax would be between 15-16% of gross winnings (GW).¹⁰²

An analysis of the H2GC report indicates that:

- 1) In all 4 scenarios the tax income objectives as the set forth in the Coalition Agreement can be met. However, due to an unstable market in a +20% GW tax model it is uncertain how annual tax targets will be met after 2 or more years after regulation. In a 29% GW effective tax scenario, the .NL market already starts to shrink as of year one (reduced to 63% channelling).
- 2) This conclusion even goes with a 10% rate where for online alone 28.7m EUR is collected in 2015 and 32.6m by 2018.
- 3) The real difference between each scenario is the degree of channelling and related consumer market dynamics.

The higher the gaming tax, the more Dutch consumers will use .com licensed operators. Therefore there will be less channelling to .NL sites and the more unsustainable the .NL licence scheme will become. By way of comparison the lower the gaming tax, the more the Netherlands will indeed become an attractive consumer alternative .local model compared to .com global competition. The more attractive, the more consumption mass will be channelled to .local and thus the more sustainable the .local model will become. As indicated above, in a 10% scenario, channelling is optimized in a 10% GW model, leading to +42% more channelling than a 29% scenario and with positive consumer dynamics going forward. In Denmark, for instance, PWC holds that in the 20% GW model only 67% of the market is channelled.¹⁰³

The Dutch government commissioned in 2011 a report by BCG in relation to the Dutch market and policy considerations. While the online industry has known material developments since 2011 and learned from re-regulation in a number of markets since then – and for that reasons alone BCG findings should be re-assessed – an initial review of the 2011 BCG Report indicates that:

- i) Certain BCG facts and data are wrong¹⁰⁴ and BCG uses to a large extent H2GC data as market source data¹⁰⁵;

¹⁰² Gaming tax would then be levied upon a Gross Profit Tax basis, which means Gross Win minus certain operational costs such as bonuses.

¹⁰³ PWC, Regulation of online gambling in Sweden, Evaluating tax scenarios in order to define the best regulatory model for the re-regulation of online gambling, 4 December 2012, pages 35, 37, 46 and 48.

¹⁰⁴ See for instance the not always consistent channelling ratio for Italy (65% to 90%), assumption that 5% taxes on turnover equates to 20%GW, mixes “chance of winning” with “pay-back ratio” (PBR), or the online gaming taxes in Belgium (11% and not 15%). BCG also makes other market assumptions e.g. that ISP and PSP blocking is efficient (FOX IT says the opposite), that with 29% GW online gaming tax they await 20-35 new market entrants (experience in Greece or Spain is far less).or that re-regulation will increase problem gambling with ~3000 players (research suggests that problem gambling will become less, as recently acknowledged by the State Secretary for Justice in his response to a Dutch parliamentary question).

¹⁰⁵ The use of same source data would imply that that the starting point is similar, but that the assessment and analysis of relevant factors is different (see above footnote 37).

- ii) The central hypothesis of the BGC report that 1% decrease of gaming tax leads to 1% increase in channelling must be scrutinized as not all players contribute equally to the market. On the contrary, less than 20% of the players are responsible for +80% of the consumption. If that top 20% cannot be channelled to .NL licences, it becomes impossible to meet the financial objectives of the Coalition Agreement (25-31m EUR). This disproportionate relationship makes it very difficult to maintain the view that a reduction of gaming tax with 1% leads to an increase of the .NL market with 1%. On the contrary, the relationship will be more -1%/+1.3-1.5%;
- iii) BGC holds that the increased cost structure can be financed by reducing the pay-back ratio. While indeed this would safeguard the operator margin – and from that point be “neutral” – lowering the PBR i) is complex from an operational point (new products) and ii) lowers the consumer value of a .NL scheme, undermining the channelling dynamics. In this view, lowering the PBR as a main policy recommendation is very counterproductive and cannot be supported.

1.6 Tax differentiation enabling a policy of consumer protection is not state aid

The primary policy of the Dutch reform is to regulate online gambling under Dutch law to increase effective consumer protection and fight organised crime. To achieve this objective, and as a performance indicator, the degree of channelling of Dutch consumption to Dutch licences based upon an attractive Dutch proposal to the customer, is not only an important enabler, but also a condition precedent. Customer value and appeal is defined by a number of factors, including product scope, positive user experience and the cost of gambling measured against the financial price money or return to player. The Pay-Back Ratio is mainly and in principle defined as a negative correlation with the gaming tax and overall effective cost structure. The higher the PBR must be to be competitive against global.com competition, the fewer margins are available for costs, including gaming taxes and levies.

Against the benchmark of global online competition with a near zero gaming tax rate .NL operators are willing to absorb a reasonable tax rate, up to the point that the tax rate does not undermine optimal consumer channelling or their own existence.¹⁰⁶ The question is therefore not if the online gaming tax is 9% less than 29% GW in retail, but whether 20 % is too far upwards from the zero gaming tax situation against the competitive benchmark of global online .com competition (i.e. bottom up approach till the licensing scheme brakes).

Furthermore, as will be explained in this section a difference in taxation between land based gambling and online operators is also not only allowed, but is even a necessity.

While the European Commission’s decision in the Danish State aid case¹⁰⁷, whereby it ruled that a differentiation was state aid – although as such justified, is unfortunate – it is just an initial decision in this matter and far from final. The European Commission even explicitly stated that its decision was made as it was made because of a lack of factual information and evidence, notably in relation to the selectivity and effect of the tax measure.

Only if taxation favours undertakings which are in a comparable legal and factual situation in the light of the objective pursued by the taxation measure can the measure be considered *prima facie* selective. However, if a tax measure can be “justified by the nature or general scheme of the system of which it is part” it will still not amount to state aid.

¹⁰⁶ See supra, Figure 3: Comparative overview of cost structure online gaming taxes licenses in EU Member States and P&L impact.

¹⁰⁷ Commission decision of 20.09.2011 on measure No C 35/2010

Under the Dutch regulations, the online and land based industries are not in a comparable situation, especially not from a consumer experience perspective¹⁰⁸, because:

- a) The main objective pursued by the Dutch online taxation is one of consumer protection aimed at channelling, and not with the goal of generation of state revenue

Although it can be argued that any tax inherently raises state revenues, the taxation of online gambling is first and foremost a regulatory tax. As with for instance environmental taxes, the objective is to channel people's behaviour in a desired direction. A gambling tax set at the right level has the effect of incentivising customers to use online operators licenced in the Netherlands in order to ensure high standards of player protection. If the tax rate is set too high, this would nullify the incentive effect since fewer (if any) online operators would apply for a Dutch licence and customers would certainly continue to play on .com and find a more attractive offer there. This is a distinct difference compared to the land based operators where the taxation objective is purely fiscal.

- b) The digital market is consumer led

Retail markets are more product/supplier led and due to the geographical limits the consumer must accept the product offered. In terms of gambling, the land based casino player often only has one choice with the local land based casino (which in principle holds a local mini monopoly). In the digital reality on the other hand, the customer is king. The online consumer has endless choices and in the digital global market without physical constraints, new technologies empower the consumer to decide what product that best meets his/her personal demand. As also recognised by the European Commission¹⁰⁹, the way that consumers compare, purchase and sell goods and services, the way they search and share information or make it available over social networks, the way they manage their payments and data, the way they learn and train, interact and exchange has completely changed the market dynamics for consumers.

¹⁰⁸ While land-based server gaming may use of new technologies to interconnect different machines and games located across different locations, the customer still has to go to the retail outlet and participate in person in the game. In an online gambling environment, the gambling service is provided by information society services where the service is provided without the parties (ie customer and provider) being simultaneously present (Directive 98/48/EC).

¹⁰⁹ There are many references to be made but please see for example:

- Commission Communication, A coherent framework for building trust in the Digital Single Market for e-commerce and online services, SEC(2011) 1640, http://ec.europa.eu/internal_market/e-commerce/docs/communication2012/COM2011_942_en.pdf.

- Commission Staff Working Document, Of Knowledge Enhancing Aspects of Consumer Empowerment, SWD (2012) 235 final, http://ec.europa.eu/consumers/strategy/docs/swd_document_2012_en.pdf. Consumer Focus is a statutory organization in the UK, created through the merger of three organisations – energywatch, Postwatch and the National Consumer Council (including the Scottish and Welsh Consumer Councils) – by the Consumers, Estate Agents and Redress (CEAR) Act 2007.

- Commission Staff Working Document, Online services, including e-commerce, in the Single market, SEC (2011) 1641, http://ec.europa.eu/internal_market/e-commerce/docs/communication2012/SEC2011_1641_en.pdf.

- Commission Staff Working Paper, Consumer Empowerment in the EU, SEC (2011) 469, http://ec.europa.eu/consumers/consumer_empowerment/docs/swd_consumer_empowerment_eu_en.pdf.

c) Online gambling is based on a completely different business model

EU state aid control is intended to prevent that certain undertakings are being placed in a more favourable position than that of its competitors. The online and land based industries however operate in completely different market segments and their respective operations are based on a completely different business model which means that they do not compete with each other. One of the most obvious differences in business models is the pay back ratio. The online industry has an average of 95% in pay back ratio whereas land based has an average pay back of closer to 55%, and sometimes as low as 30%.

The higher pay-back ratio also means that even in the theoretical case that land based and online operators were to be seen to compete, there is no favourable treatment for the online industry by a tax differentiation because the online industry has lower margins and less ability to pay. This can be illustrated by a simple example:

- A land-based operator retains 45 Euro from a stake of 100 as gross gaming revenue (GGR), and the online operator retains 5 Euro. This means that before taxes, the land-based operator has a GGR that is approximately 9 times bigger than the online operator.
- Let's say for the sake of argument that the land-based operator has to pay a tax of 40% of GGR. It can then keep as revenue after taxes an amount of **27 Euro**. If the online operator is subject to a tax of 10% of GGR, all that remains after taxes is the amount of **4,5 Euro**.

In fact, what the example shows is that if the taxation level was set at the same rate for the different markets, it would be the online industry that would suffer a significant competitive disadvantage.

1.7 Conclusions and online industry recommendations

Based above the above points (H2 report & BGC report), some conclusions can be formulated:

- 1) The most representative reports are the ones from H2GC.¹¹⁰The BCG 2011 report must be placed in context and its main assumptions/conclusions must be re-assessed.
- 2) While in a 29% GW effective tax only the short term financial targets can be met, the 15% and 20% GW tax are suboptimal as investment in consumer value is not maximised, leading to hampered channelling of consumption (85% and 75% vs. +96% in 10% GW model).
- 3) A 10% GW model is optimal as it structurally meets the financial targets of the Coalition Agreement (25- 31m EUR) and - above all - optimises the channelling of Dutch consumers to Dutch licences with +95 (the primary policy objective). This +40% more channelling than in a 29% GW model
- 4) Furthermore, a 10% GW model ;
 - a. Confirms the Dutch policy as explicitly and consciously motivated by optimising effective consumer protection and creating a regulated market, as opposed to primarily driven by financial considerations¹¹¹ or political compromise;

¹¹⁰ H2GC has produced a number of reports in relation to the Netherlands (going back to 2011). While final numbers may differ in a non-material manner from report to report, the main findings over the last year are always consistent: it is believed that a lower gross win tax would stand best chance of establishing a market equilibrium that is inclusive of the needs of the Dutch government, consumer and the operator.

¹¹¹ See constant case law of the Court of Justice of the European Union and the EC infringement procedures, including the still pending Reasoned Opinion against the Netherlands as part of the pending EC infringement process.

- b. Optimises the possibility to leverage macro-economic effects and consumer value creation, notably in terms of operator investment in media, compliance products, bonuses and technology and innovation to ensure the attractiveness of the Dutch model and continued consumer value. In doing so, it takes away the commercial incentive to stay outside the .NL licence scheme and/or maintain the current status quo.
 - c. Allows the imposition of other costs as specified elsewhere in the proposal (e.g. bonuses, KSA levy and contributions to RG fund and Central Register), which are needed to carry out the intended gaming policy;
 - d. Is in line with Dutch gaming tax practice in place (Bonaire and effective tax pressure lotteries) and international trend to lower online tax rates (Britain, Belgium, French online poker tax, Finland or Estonia)
- 5) To remain price competitive and irrespective of other policy considerations, we advocate that the total effective cost burden cannot go beyond 20% GW as this is the "*rate of no return*"
 - 6) Tax differentiation is a necessary means to ensure that the Dutch online offer is price competitive with its .com global competition, operating from zero tax jurisdictions. From this point of view, it cannot possibly constitute state aid. If a uniform tax treatment would be imposed, this would constitute state aid to land-based operators who - due to higher overall P&L margins - can absorb a higher gaming tax cost than pure online operators (*effect analysis*)
 - 7) If in contrast a uniform tax rate should apply to all forms of gambling, it would also need to cover off lotteries and that lotteries would be taxable on the 1st EUR GW, without any tax free basis (currently 450 EUR of price money)

2 Responsible Gambling and Consumer Protection

The primary objective of the draft law is that Dutch citizens who want to participate in online gambling have to be able to do that in a responsible and reliable way. The draft law rightly identifies consumer protection and the prevention of gambling addiction as essential parts of this policy.

Before addressing the obvious and serious health issue of problem gambling, it is important to acknowledge that the overwhelming majority of players are recreational players that enjoy the entertainment gambling provides without any real problem. There is a broad consensus that **98% of the players do not develop problematic gambling behaviour and less than 2% develops a compulsive behaviour disorder**, a number that has not increased since the introduction of the Internet and is independent from the regulatory system in place (see point I 1.2.2 “Detection and prevention of problem gambling”).¹¹²

The industry has the obligation to provide every player with clear and understandable information on responsible gambling, terms and conditions, available tools to control their behaviour, complaint procedures etc. (“**informed adult choice**”). This obligation is towards every player allowed to register and log-in on gambling websites. Problem gamblers that have (been) excluded – listed in the central register - do not qualify as active players, nor do under age people. Underlying this obligation is the basic principle that the adult individual should be able to make his own decisions based upon information provided by the operator. Restrictions to this fundamental right of an individual to self-determination and choice are the exception and can only be imposed accompanied by a well-established and balanced legal framework and due process¹¹³. Involuntary treatment should be therefore avoided as it entails disabling the person from exercising his own willpower¹¹⁴, unless in exceptional cases where the customer provides unmistakable indication of manifest consequences of disordered gambling and should be protected against himself.

2.1 The proposed consumer protection policy

2.1.1 Player categorization

For the purpose of providing consumer protection and the prevention of problem gambling the draft law distinguishes three groups of players: recreational players, potential risk players and potential problem players. While the principle of categorization can be supported on an abstract level, the generalisation in terms of approach and treatment cannot. Whereas there is a general statement that the Dutch prevention strategy foresees different approaches for recreational gamblers, at-risk gamblers and problem gamblers, the text often mixes up and overlaps the different groups. The Explanatory Memorandum is unclear how these groups are distinguished in practise, on the basis of what criteria they are identified and what the appropriate policy response is for each individual of these groups.

¹¹² Conclusions to European Commission workshop on detection and protection of online gambling (available at http://ec.europa.eu/internal_market/services/docs/gambling/workshops/workshop-ii-conclusions_en.pdf).

¹¹³ See notably the provisions in the Dutch Civil Code concerning “Bewindvoering en curatele”, Civil Code art. 1:378, 1:379 and following and art. 1:431 BW or the Act on forced admission in psychiatric hospitals (Wet opnemingen in psychiatrische ziekenhuizen (Wet Bopz)).

¹¹⁴ See for instance the Act on forced admission in psychiatric hospitals (Wet opnemingen in psychiatrische ziekenhuizen (Wet Bopz)) and the Supreme Court rulings of 23 September 2005, NJ 2007, 230 (available at <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2005:AU0372>) and 5 October 2007, BJ 2007/43, LJN BB3320 (available at <http://jure.nl/ecli:nl:hr:2007:bb3320>).

The Explanatory Memorandum states that the remote gambling operators have a far-reaching duty to protect players against themselves. A particular concern in this respect is the lack of distinction the draft law makes between potential risk players and potential problem gamblers. The Explanatory Memorandum provides several examples where the operator is required to intervene with specific measures, but based on criteria that are either unclear or undefined, and without substantiating how these measures can genuinely contribute to the prevention of problem gambling. For instance risk players and problem players are both subject to the same treatment in terms of exclusion, etc. Sometimes the suggested wording seems to be contradictory. Whereas problem gamblers can only be excluded for 6 months, *at risk gamblers* are equally listed in the central register for at least six (6) months and until the player can demonstrate that he is no longer is at risk.

However, there is a substantial difference between risk players of whom most will never suffer any gambling related problems and problem players and both groups require an entirely different approach as a uniform treatment could have severe and negative effects. In addition, individual players are not static per se, they can also move between all three groups.

While a more direct approach, as described in the draft law¹¹⁵, can be beneficial for actual problem players, it will not have the same effect on potential risk players. In line with scientific findings described before, risk players will benefit more from an informative approach where they are proactively informed about the risks of gambling and the available online tools to prevent their gambling behaviour from spiralling out of control or developing into problematic behaviour, such as deposit limits or product exclusions. A distinction between these player categories is therefore highly recommendable. Although it is desirable to have risk factors defined in the draft law, these should not be generic as account has to be taken of each player as an individual and the fact that emerging science may at any time lead to those risk factors changing.

EGBA and RGA therefore invite the Dutch policy makers to clarify and provide more guidance on the separation of each category of players in terms of approach (avoiding a “one size fits all” model), while at the same time acknowledging that:

1. The absolute majority of the players are recreational players and do not experience any risk or problem behaviour;
2. Players’ behaviour is dynamic and may evolve (“sliding scale”);
3. An overall balanced view is necessary as a too rigid or disproportionate approach may have a contrary effect on players and scare them away to non-Dutch regulated operators, undermining the fundamental channelling objective (one step forward, two steps back);
4. While certain general solutions might fit certain categories of players, each player and each problem situation is unique and requires an individual and personalized approach based on the player’s behaviour.

2.1.2 Player profile

The Explanatory Memorandum¹¹⁶ introduces a number of (non-binding) indicators (player profile), which a player has to apply in order to create an account including:

- 1) maximum frequency of bets
- 2) maximum duration of sessions

¹¹⁵ Notably the (involuntary) exclusion from gambling for a minimum period of 6 months per registration in the Central Register, see Explanatory Memorandum page 28 and articles 31b, 31d, 33a, 33h

¹¹⁶ Explanatory Memorandum, p. 18

- 3) maximum deposits and
- 4) maximum balance

If the player goes past any of these limits he should receive warnings that they gambled more than initially indicated. This is just a trigger function and the player account does not stop functioning. These so-called additional “hard stop” limits are based upon responsible gambling tools configured on player account level, such as deposit limits, product exclusions or a wide range of “time-out” measures, and cannot be exceeded. .

The proposed system, including the number of restrictions, is very complex for a player to understand and properly apply. It requires too much information from the player, including on how the several limits interact and interfere with his gaming behaviour. Such a complex user experience may scare the player “away” (one click too many) and is thus likely to undermine channeling.

There is not only a risk that it discourages potential players from playing on licensed websites, but it could also lead to players setting limits extremely wide or, alternatively, a flood of warnings when the player sets the limits too narrow. If these warnings require a response by the operator and/or regulator, the number of faulty warnings will render it unworkable. In all these circumstances, the player profile as currently proposed will not provide any added value for player protection by influencing his or her gaming behaviour.

What could be applied instead are for instance deposit limits (per day, week or month) set by the player. If the player goes past them, they should be stopped and the player should wait 7 days before being able to increase them (cool off period). The costumers should be informed about their responsible gaming choices, which they should make within 60 days from account opening.

2.1.3 Duty of care - Prevention and Intervention

While the operators acknowledge that they have a reasonable duty of care towards the consumers, the lack of clarity in respect of the scope of that duty, and thus the margin for arbitrary decisions, is cause for concern and requires further clarification.

Furthermore, the far-reaching duty of care as described in the draft law shifts the responsibility for moderate gambling from the player to the operator, putting the latter in charge of the perception and qualification of possible problem and/or risk behaviour.

For instance, the Explanatory Memorandum suggests that operators should intervene directly in the play of recreational players “to prevent as much as possible that recreational players develop into risk or problem players and to encourage that gaming behaviour stays recreational.” Or if a player exceeds a non-binding money limit he has set himself, the operator is nevertheless required to exclude that player for an (undefined) period.¹¹⁷ The draft law also forces operators to automatically suspend players from participation in case of declined voluntary exclusion or in case of any further assumption of harmful behaviour, but without defining what that is defined as.¹¹⁸ Not only does this in practice come down to the reversal of the fundamental “self-determination” principle, forcing players to prove to the competent authority that they are still in control of their gambling behaviour; it also forces operators to inform the regulator in case of any reasonable assumption of harmful behaviour on behalf of a player, which goes well beyond any confined definition and leaves too much margin for arbitrary decisions where operators will be pushed to denounce players. It can be

¹¹⁷ See Explanatory Memorandum pages 7, 18, 19 and 29, article 31l, 2nd indent, article 31n, 1st indent.

¹¹⁸ See Explanatory Memorandum pages 49-50.

assumed that players, who are excluded against their will, will not bother to follow this “guilty until proven otherwise” process and simply open player accounts with operators outside the Dutch .NL licensing scheme. And even in case if they do not open a foreign account, this still leaves the fact that there is no objective test that the authorities can use to satisfy themselves that the player has regained sufficient control of his behaviour not to constitute a risk.

This would mean a huge assessment responsibility weighing on operators in the perception and qualification of possible problem and/or risk behaviour, not only suggesting to the player that the responsibility for moderate gaming behaviour is no longer on himself but on the operator (in contradiction with prevailing science regarding prevention of problem gambling) but also exposing the operators to potential litigation and liability claims.

Such an obligation and responsibility should not be imposed on the operator because it oversimplifies the practical difficulties associated with accurately identifying high risk and problem gamblers. There is some experimental work with behavioural prediction for the detection of problem gamblers, but the predictive power is not sufficiently reliable to base decisions with legal effect on.¹¹⁹ Moreover, and if the primary liability is moved away from the player and is vested with the operator, it will actually encourage players to gamble even more as losing players will have the financial safety net of the operator’s legal liability. When players lose money, they will institute legal claims against operators to recover their losses. It would be contrary to consumer protection policy logic. If for instance, chasing loses, generally considered as an indicator of problem gambling,, would become a financial risk free operation for the player. To limit their disproportionate exposure to claims from losing players, operators will become very risk averse in their overall compliance obligations using disproportionate strict precautionary measures to try to stay on the right side of the liability line. Such operator restrictive approach will directly undermine user experience and hence the channelling of players to Dutch licensees.

For these reasons and acknowledging a means based duty of care, RGA and EGBA recommend that the starting point remains that each individual is responsible for his/her own actions and that besides an overall clarification of the duty of care of operators, a clear delimitation thereof should be made based upon positive and negative criteria i.e. taking *inter alia* into account the need to have an individual problem based approach (not one solution for all problems) or science based risk indicators for compulsive disorders.

2.2 Consistent approach

In terms of responsible gambling, the industry therefore pleads for an overall consistent approach covering all facets of the process, primarily empowering the customer to make well-informed decisions and allocating responsibilities accordingly. The draft law should provide a clear distinction

¹¹⁹ The predictive model, which the Division on Addiction of Harvard Medical School has been working on for the greater part of the last decade, is the best documented approach in behavioural prediction in gambling so far. It provides a generalizable prediction rate of around 80%. In practice that means that with an approximately 2% prevalence of problem gamblers, out of 1000 gamblers:

- 20 would be problem gamblers: 16 of them would be correctly detected; 4 would be missed

- 980 would be recreational gamblers: 196 of them would be falsely detected as problem gamblers

Out of those 212 persons detected by the model and reported to the regulatory authority 92% would be recreational gamblers who were falsely identified. The purpose of developing such models is to identify risk behaviour and to supply those players with additional awareness, information and feedback.

between the different groups of players; detail what the defining criteria are and what appropriate measures can be taken that genuinely will impact problem gambling or risk behaviour.

The current unspecified and wide duty of care on operators, wrongly suggesting that the operator rather than the player himself can control his gambling behaviour, should be redefined as it is unmanageable. The information duty on the operator can be made depending on whether the player is recreational or is determined to be an at-risk player.

The shifting of the responsibility also goes against established scientific research which has shown that customers who are informed and armed with appropriate tools to manage their behaviour, are most likely to restrain their gambling habits to an acceptable level and will find their way to help and treatment if necessary. This approach will create a more balanced system and support channelling as an enabler of the primary policy objective to protect consumers:

1. Operator:

Should take a proactive preventive and informative approach towards the customer whereby supportive information is made available to the customer in a transparent manner and whereby the customer is proactively monitored and informed about the available responsible gambling tools to manage his behaviour (“informed adult choice”). As part of the licensing scheme structural cooperation between operators and care sector must be made possible, including the possibility to refer players from the operator to the care sector for professional treatment; and

2. Care sector:

To follow-up support of customers, actively referring them to experts and treatment centres who can assist them with the treatment of their problem behaviour; and

3. Regulator:

Keep and maintain an effective and performing central register.

Due to the intrusion on the customer’s free will, involuntary treatment mechanisms should be the ultimate resort and an exception, only after it has become clear that a player is suffering gambling-related harm and supplementary responsible gambling tools no longer suffice.

While the registration of a player in a central register for a (minimum) period of 6 months can be an appropriate tool in the fight against gambling addiction, it should never be the only tool and other measures can be more effective. Many operators already offer such tools¹²⁰ to their customers, such as the possibility to block certain product groups, the possibility to exclude for 1 week or 1 month, the possibility to install certain blocking software or – most important – to set-up deposit limits to players stay in control of their budget, etc.

2.3 Industry recommendation: Shared responsibilities

Considering all the above, and with the view that operators have a duty of care towards their players, responsible gambling is above all a shared responsibility between key stakeholders, including the player. With this fundamental principle in mind, and against the basic categorisation of players, we encourage the Dutch policy makers to:

¹²⁰ Note: the most efficient tools work on player account level and enable a holistic approach. Experience, for instance in France, has shown that it is better to have a few good tools on account level than a multitude on measures on e.g. transactional product level as the “variety” of measures on this level will above all confuse the consumer.

1. Clarify and provide more guidance on the separation of each category of players in terms of approach (avoiding a “one size fits all” model), while at the same time acknowledging that:
 - a. The absolute majority of the players are recreational players and do not experience any risk or problem behaviour; and
 - b. Players’ behaviour is dynamic and may evolve (“sliding scale”); and
 - c. An overall balanced view is necessary as a too rigid or disproportionate approach may have a contrary effect on players and scare them away to non-Dutch regulated operators, undermining the fundamental channelling objective (one step forward, two steps back); and
 - d. While certain general solutions might fit certain categories of players, each player and each problem situation is unique and requires a personalised approach.
2. For recreational and potential at risk players, the main focus should be on a preventive approach, providing transparent information and offering online account tools that allow players to stay in control of their behaviour. Such approach does not interfere with their informed adult choice, and secures player buy-in acceptance of their individual situation.
3. For problem gamblers, more thorough measures should be in place: problem gamblers should be excluded for 6 months in the central register and directed to the care sector for professional treatment. While the central register remains an exceptional measure and should only be reserved for problem gamblers or other players that choose to self-exclude, a consistent and efficient approach requires it to cover all products.
4. Involve all stakeholders to cooperate in a structured and constructive manner, notably to allow the Dutch model and the understanding of problem gambling to be improved on a continuous basis, ultimately generating a more efficient policy in this area. The Dutch licensing scheme should encourage this cooperation between care sector and online operators, enabling them to improve their internal responsible gambling policies and promoting a transparent fact based approach.

3 Primary gaming Server

3.1 The Freedom of establishment

The draft law introduces a primary server and storage medium requirement in the Netherlands¹²¹, *unless* there is a Memorandum of Understanding (MOU) between the regulators involved, which has an equivalent effect as an establishment requirement (with subsequent tax implications) and impedes operators from offering their (cross-border) services via their own technical infrastructure located in the EU/EEA.

In its current form the draft law thus infringes the freedom of establishment by enforcing a primary server and/or data server location obligation in the Netherlands or in a Member State with which the regulator has signed a Memorandum of Understanding (“MoU”). Seeking a way to enforce control and verification on the one hand and duplication of IT infrastructure on the other hand are two separate issues. Duplication should be avoided at all times due to the inherent risks of sub-investment, counter-production and overall decreased performance. The regulator’s concerns of control can be easily overcome through appropriate certification processes, by virtual private network (secure data links), etc. One does not have to impose the localisation of IT infrastructure to achieve the desired level of control or acquire access to the requisite data.

Furthermore, this requirement violates the general standard for the justification of non-discriminatory restrictions to the fundamental freedoms of the Treaty as it is a well-known fact that the conclusions of these MOU’s is a lengthy and political process and that there is as such no obligation for the Dutch regulator to conclude or seek to conclude such agreements. The absence of a binding rule with regard to the recognition of requirements fulfilled in other Member States goes beyond what is necessary and thus violates articles 54 and 56 TFEU.

3.2 Additional cost, less effectiveness

In the first place, IT localisation represents a significant operational burden and cost for the operators concerned. Second, a decentralised IT infrastructure will never be as effective as a centralised core infrastructure aligned with the highest industry standards and best practises, ultimately jeopardising user experience and customer trust. Furthermore, there are sufficient security standards in place (ISO standards, e.g. ISO 27000) which can provide overall guidance and the necessary guarantees as to the efficiency, security and performance of the infrastructure. In that respect, reference is made to the cooperation mechanisms which are in place today, such as the European Consumer Centres Network (ECC-Net)¹²² and the existing cooperation within the context of the European Union in for example the area of freedom, security and justice.¹²³

It is established jurisprudence¹²⁴ that the requirement of having a server on the territory of the host Member State constitutes a requirement of establishment and thereby infringes the freedom of

¹²¹ Explanatory Memorandum, Ch.4.7. Measures for supervision, pp.25-26

¹²² Regulation 2006/2004 on Consumer Protection Cooperation available at http://ec.europa.eu/consumers/ecc/index_en.htm

¹²³ Available at http://ec.europa.eu/justice_home/fsj/police/fsj_police_intro_en.htm, notably the EU Forum on Organised Crime Prevention See also cooperation mechanism within other sectors such as electronic commerce, such as the “National E-Commerce Contact points” or “the Expert Group on electronic commerce”, available at http://ec.europa.eu/internal_market/e-commerce/expert-group-members_en.htm.

¹²⁴ Court, judgment of 9 September 2010 in Case C-64/08 *Ernst Engelmann*, ECR [2010] 08219; paras. 37-39

establishment (Article 49 TFEU) and the freedom to provide services (Article 56 TFEU), which is prohibited unless duly justified. Under the CJEU's settled jurisprudence, non-discriminatory restrictions of the freedom to provide services can only be justified if they serve imperative requirements in the public interest and are suitable for achieving the objective which they pursue, thereby not going beyond what is necessary in order to attain these imperative requirements.

Discriminatory measures, such as these, contravene EU law if not justified on the grounds of public policy, public security and public health.¹²⁵ The CJEU has recently reiterated that a certain number of overriding reasons in the public interest, such as the objectives of consumer protection and the prevention of both fraud and incitement to squander money on gambling, as well as the general need to preserve social order, may justify restrictions on the freedom to provide services, but that "those objectives cannot be relied upon to justify discriminatory restrictions".¹²⁶ The CJEU has also held that the requirement of a permanent establishment can only be accepted if it is shown "that it constitutes a condition which is *indispensable* for attaining the objective pursued" (our emphasis added).¹²⁷ According to Advocate General Poiares Maduro "the Court has only very exceptionally recognised this as being the case".¹²⁸

The Netherlands is prevented from invoking the objectives of seeking to protect players because, as the CJEU pointed out in *Commission v. Spain*, "the objectives of consumer protection and the prevention of both fraud and incitement to squander money on gambling, as well as the general need to preserve the social order ... cannot be relied upon to justify discriminatory restrictions".¹²⁹

Nor may the Netherlands invoke the objective of an effective control on games of chance offered in the Netherlands to the extent that this objective seeks to provide a solution to the practical difficulties encountered by the Dutch Gaming Authority in controlling non-Dutch regulated websites. The CJEU has consistently held that "mere practical difficulties ... are not, in any event, sufficient to justify restrictions on a fundamental freedom or, a fortiori, a derogation under Article 52 TFEU, which presupposes the existence of a genuine and sufficiently serious threat affecting one of the fundamental interests of society".¹³⁰

3.3 Physical presence is not indispensable

As stated above, the CJEU has clearly indicated that practical difficulties cannot, in any event, justify restrictions on a fundamental freedom or, a fortiori, derogation under Article 46 EC (now Article 52 TFEU).¹³¹ It follows that the practical difficulties cited in the Explanatory Memorandum cannot justify a mandatory physical presence on Dutch territory.

¹²⁵ Court, judgment of 21 January 2010 in Case C-546/07 *Commission v. Germany*, ECR [2010] 00439, para. 48

¹²⁶ Court, judgment of 6 October 2009 in Case C-153/08 *Commission v. Spain*, ECR [2009] 09735, para. 36

¹²⁷ Court, judgment of 3 October 2006 in Case C-452/04 *Fidium Finanz AG*, ECR [2006] 09521, para. 46; Court, judgment of 9 July 1997 in Case C-222/95 *Société civile immobilière Parodi*, ECR [1997] 03899, para. 31; Court, judgment of 4 December 1986 in Case C-205/84 *Commission v. Germany*, ECR [1986] 03755, para. 52.

¹²⁸ Opinion of Advocate General POIARES MADURO of 14 December 2006, in Case C-134/05, *Commission v. Italy*, ECR [2007] 06251, para. 39. The Advocate General, referring to *Van Binsbergen* (Court, judgment of 3 December 1974 in Case 33/74, ECR [1974] 01299), claims that "the only example which can be cited is the provision of services by lawyers representing a client before the courts".

¹²⁹ *Commission v. Spain*, para. 36

¹³⁰ Court, judgment of 21 January 2010 in Case C-546/07 *Commission v. Germany*, ECR [2010] 00439, para. 51. In the same sense, see, for example, Court, judgment of 27 November 2008 in Case C-418/07 *Société Papillon*, ECR [2008] 08947, para. 54.

¹³¹ *Commission v. Germany*, para. 51

If a licensee is found to have breached the gaming laws, then the Dutch Gaming Authority can in any event withdraw their licence, impose an operating ban, or exact an administrative fine. Moreover, recourse to the grounds of public policy, public security and public health “presupposes the existence of a genuine and sufficiently serious threat affecting one of the fundamental interests of society”.¹³² Within this context, according to the ECJ, “it cannot be argued that this threat would arise from the impossibility for the [national] authorities, if the rule in question did not exist, to monitor effectively the activities carried on by ... undertakings. Checks may be carried out and penalties may be imposed on any undertaking established in a Member State, whatever the place of residence of its directors. Moreover, the payment of any penalty may be secured by means of a guarantee to be provided in advance”.¹³³

It should be noted finally, that the need to have a permanent establishment or branch on the Dutch territory in order to regulate games of chance more efficiently is not “accompanied by appropriate evidence or by an analysis of the expediency and proportionality of the restrictive measure adopted by that State, and precise evidence enabling its arguments to be substantiated” (our emphasis added).¹³⁴ The Dutch authorities have not produced such evidence and, therefore, may not institute a requirement to have a permanent establishment or branch on the Dutch territory.

3.4 Control Data server

The primary reason for obliging operators to have a storage medium located in the Netherlands is control and verification, which, as such, does not render the physical presence of local data storage media indispensable.

As a consequence of this regulation, domestic operators are afforded a significant advantage against potential newcomers from other EU Members States. This violation is exacerbated by the existence and ready availability of technology which enables the verification of data stored on a server via virtual access without the need to physically visit the server. Thus, the server location requirement is clearly not the least restrictive solution possible. The regulator could obtain the same objectives in a less discriminatory manner- for example by utilizing the above virtual access to the data stored on the server. The server location requirement also discriminates against EU operators by adding an additional burden upon them that domestic operators do not face. EU operators will face higher start-up costs including purchasing office space, purchasing new server equipment and software, and hiring employees to maintain the server.

3.5 Industry Recommendation

A workable solution that fulfils the requirements of the regulator, EU law and what is practical for operators has been applied in Denmark. Following experience in Denmark, the online industry recommends that within the EEA area localisation of primary gaming equipment is not made subject to an MOU, but that such condition is maintained as part of an approach to third countries outside the EEA. The Danish solution is EU-compliant and has proven to be effective. The provision suggested in the draft law is unnecessary since it does not bring any added value in terms of consumer protection. It should be stressed that it instead generates high additional compliance costs for operators who are forced to adequately adopt their equipment. There are also a number of

¹³² Court, judgment of 29 October 1998 in Case C-114/97 *Commission v. Spain*, ECR [1998] 06717, para. 46.

¹³³ *Commission v. Spain*, para. 47.

¹³⁴ Court, judgment of 19 June 2008 in Case C-319/06 *Commission v. Luxembourg*, ECR [2008] 4323, para 51.

alternatives that might be considered by the Dutch authorities that are being applied in a number of jurisdictions. Those are for instance connections with control database or virtual private networks (VPNs).

4 Product scope

4.1 Main issues and concerns

One of the major issues with the draft law is the exclusion of some of the gaming market from the remit of this legislative change. For instance, the draft law introduces an unjustified exclusion of lotteries from its scope. This is contrary to the obligation that Member States have to ensure that the measures applied by them are transparent, non-discriminatory, proportionate and consistent including *“their regulatory approaches to the online and offline offers of the same type of game as well as to games which are clearly comparable in terms of the degree of risk they bear in relation to fraud and/or consumer protection”*.¹³⁵ In case of imposing additional restrictions Member States are obliged to provide appropriate evidence proving that such measures are indispensable.

4.2 Exclusion of lotteries

The key objective of the draft is to protect consumer by providing an attractive legal offer. The draft simultaneously aims to allow online competition and the online gambling industry fully endorses both objectives. However the proposed product scope goes beyond both objectives as the draft law introduces the unwarranted and unjustifiable exclusion of (online) lottery products. The claim that there is ‘no substantial demand’ for the online offer of lottery products, as well as the reference to the long-odd character of the lotteries, and that regulation is therefore not necessary at this stage, is not based on any factual analysis or study and it deprives the entire regulation exercise of its purpose.

While the draft claims to pursue an overall modernisation of the industry as well as a creating equal market access conditions for all players, old and new, offline and online, it rather reinforces the existing monopolies of the lotteries by protecting them from competition, whilst allowing them simultaneously to further develop their online business with the false excuse that this is only a continuation of the current ‘e-commerce distribution channel’ of the incumbents. This inconsistency of exceptional treatment and favouritism of the incumbent lotteries in the proposed Dutch legislation is in breach of EU law.

4.3 Proper licensing procedures, including for lotteries

Besides the legally problematic position of the lotteries, the draft law introduces a licensing procedure for the lottery licences as of 2015. Taking account of the established CJEU principles on the proper allocation of licences, the current situation in the Netherlands in that respect raises serious concerns. The CJEU has clearly ruled that a Member State cannot protect the market positions acquired by the existing operators by excluding certain operators from the award of licences since all potential tenderers must be able to participate and must be subject to the same conditions.¹³⁶ Despite the intentions of re-regulation, an overall process that can take a considerable amount of time without any guarantees for the online operators, the current situation in the

¹³⁵ Communication from the Commission to the European Parliament, the Council and the Economic and Social Committee of the Regions: “Towards a comprehensive European framework for online gambling”, http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!DocNumber&lg=EN&type_doc=COMfinal&and oc=2012&nu_doc=596.

¹³⁶ Court, judgment of 16 February 2012 in Joined Cases C-72/10 and C-77/10 *Costa and Cifone*, ECR [2012], paras. 56-59.

Netherlands already violates standing CJEU jurisprudence, preventing online operators from offering their services under a local licence.

4.4 Restricted product and betting offer

In this highly competitive international market, characterized by a high rate of return to customers ('pay-out ratios' of on average 95%), consumers will always seek to access the best offer and the most attractive opportunities to play. New technologies and the lack of geographical limits of the Internet have empowered the customer to decide what products best meet his or her personal demand. As a consequence, and contrary to most offline markets, digital markets are consumer rather than supply driven. The best way to prevent players from using non-Dutch regulated website is offering an attractive, competitive and unrestricted products choice.

The significance of an attractive legal product offer to protect consumers has been stressed by the European Commission in its recent Communication on online gambling and is similarly an objective outlined in the draft law.

4.4.1 Exclusion of event betting

By excluding event betting from the scope of the draft law, the customer's choice in products is in advance restricted and customers who are looking to participate in such betting offer are forced to play with non-Dutch regulated operators to satisfy their demands. The same can be said about an over-restrictive policy in terms of bonuses and jackpots. The practical consequences of these measures undermine the underlying objective of the draft law, which is to make sure that the highest amount of Dutch customers makes use of the regulated offer.

Experience in other Member States has shown that the exclusion of certain products or product categories or the limitation of events on which bets can be placed can have catastrophic effects on channelling and the decrease of the illegal gambling market. In France for example the exclusion of product categories such as casino games has created a market where more than 60% of the market remains outside the French regulated offer and a high number of licences have returned their licences due to the unattractive commercial possibilities. The same can be said for the imposition of a limited list of competitions on which betting is authorised ("*authorised unless prohibited*"), which is a common practice in France, under the pretence that this will limit the organisation of betting on competition categories and types of results with risks factors of manipulation.¹³⁷

Besides the definite impact on the channelling objective (see *supra*, point 2.2), which is already rather low, it goes against CJEU jurisprudence where it was clearly stated that a Member State has to regulate all the types of games in its territory in a consistent and systematic manner, without any exceptions (see Chapter II). While the product exclusions in the draft law are not as far-reaching, the principle remains intact: a consistent and attractive gambling policy should cover all gambling products to achieve optimal channelling and consider the evolutionary nature of online gambling.

The industry calls for a gambling policy truly in accordance with this principle of consistency and admonishes the government for the undermining and jeopardising effects of any undue restrictions of the product offer.

¹³⁷ List of authorized competitions and events available at <http://www.arjel.fr/-Athletisme-.html>.

4.5 International liquidity

The draft law wrongfully describes international liquidity as an “international pool of players” and “foreign players registering on national websites”. International liquidity is a contributing factor to the attractiveness of the game and therefore overall channelling. The success rate of the Dutch online gambling system depends partly on the possibility to engage in international liquidity. It is therefore all the more important that the concept is given the correct interpretation.

4.6 Industry recommendation

The online Industry calls for an overall consistent gambling policy which prioritizes channelling as the highest warrantor for proper consumer protection. To achieve the desired level of consistency, lotteries should be included in the scope of the draft law, and subjected to the same regulation process, as there is no reasonable justification to exempt them. Furthermore, the online industry is in favour of a broad product scope, including amongst others event betting, as well as an unlimited list of events on which bets can be placed.

5 Privacy

The right to privacy is an essential human right in every democratic society and is to be protected to the fullest at all times. Although the processing of certain personal data is inevitable, it must be reduced to a strict minimum. The justification outlined in the draft law that personal data can be processed for overriding reasons of public interest is insufficiently substantiated and an actual assessment by the Dutch Data Protection Authority (DPA) is missing.

While the draft law acknowledges the right to privacy of the Dutch citizens, it introduces a number of measures which contradict the essence of this right and essentially impede and violate it.

5.1 ISP and PSP blocking

The draft law includes the possibility for the regulator to ban Internet (ISP) and Payment Service Providers (PSP) from providing services to or facilitating the activities in any other way of online gambling operators who do not have a Dutch licence. While proper enforcement is to be encouraged and before scrutinizing the legality and effectiveness of these measures, it should be emphasized that “non-Dutch regulated” gambling is best tackled through appropriate and effective regulation that achieves an optimal level of channelling. In this view, priority must be given to creating an attractive.NL alternative offer based upon consumer demand and digital market reality. Tough enforcement measures against non-Dutch regulated .com offerings, if at all possible, at best have a smaller correcting effect, but do not replace the primary tool to create an attractive offer and channelling dynamics.

Furthermore, examples from other countries clearly indicate the failing efficiency of these measures to disable or ban illegal gambling.¹³⁸ In Norway, for example, the ban on payment transfers appeared to be far less effective than planned with players not experiencing any major difficulties in transferring deposits to foreign gambling companies despite the ban. The possibilities for circumvention with third party payments also seemed endless.¹³⁹ While in Norway, cross-border effects of the payment ban were reported e.g. Norwegians could not pay in foreign casinos or saw their cards declined in Swedish gasoline stations that were also selling lottery tickets of the local Swedish monopoly, one can assume that this cross-border effect will be more substantial as the Netherlands are a Euro country and fully integrated with the SEPA.

The legal basis of these blocking measures is widely contested and the CJEU has previously questioned the technical effectiveness of such measures and ruled that EU law does not permit the imposition of an obligation on an ISP to install a filtering system which screens all traffic in order to prevent the use by its customers of infringing websites, as this would result in a serious infringement of the ISP's right of freedom to conduct business under Art 16 of the Charter of Fundamental Rights of the European Union.¹⁴⁰ The suggested blocking mechanisms in the draft law do just that and would constitute a serious infringement of the EU freedom to conduct business.

¹³⁸“Security and Other Technical Concerns Raised by the DNS Filtering Requirements in the PROTECT IP Bill”, Steve Crocker, Shinkuro, Inc., David Dagon, Georgia Tech and others, May 2011.

¹³⁹“Evaluation of the regulation prohibiting payment transfers for gambling purposes without a Norwegian licence” (FOR 2010-02-19 no. 184).

¹⁴⁰ Court, judgment of 24 November 2011 in Case C-70/10 *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)*, ECR [2011]; Court, judgment of 12 July 2011 in Case C-324/09 *L'Oréal SA and Others v eBay International AG and Others*, ECR [2011].

Additionally, it is to be stressed that these measures are not at all favoured by the relevant providers and it is highly unlikely that they will be willing to comply with them.

5.2 Central Register (CRUKS)

The draft law introduces a central register of excluded players which will contain personal player data such as the national number ("*burgerservicenummer*"), first and surname, date and place of birth and any other data that can be used to identify the player. The exact data will be determined in secondary legislation.¹⁴¹

Due to the sensitivity of the data involved, i.e. data of addicted players which can be qualified as "medical" data, the highest protection measures have to be implemented to avoid the unauthorized use of these data or any use that goes beyond the overriding objective.

The risks involved in the suggested data collection are tremendous as it could potentially enable the regulator, who manages the register, to access data about the frequency of visits of individual players and the restrictions thereof. Such risk is entirely disproportionate to the right to privacy.

This disproportionate character is reinforced by the obligation for the operators to have a control database in the Netherlands which will contain both player and transaction data and which will be fully accessible by the regulator. The amount of the data contained in the central register in combination with the detailed transactional player data in the control database creates a situation where the invasion of the right to privacy can no longer be justified by any overriding reason of public interest.

Similar concerns were earlier expressed by the Danish Data Protection Agency in respect of the Danish central register. The Danish Data Protection Agency pointed out that the consent of the customer to be registered in the central register must be voluntary, specific and informed. It also emphasized the risk that the personal data included in the register can be used for completely different purposes than originally intended. According to the Danish Data Protection Agency, gathering these data automatically implies gathering data about the players and their activities.¹⁴²

5.3 Other

In the light of responsible gaming, the draft law suggests that it is the operator's responsibility to request the player to submit financial information indicating his "financial ability" to gamble. Such assessment, and the information that would have to be submitted by the player to enable the operator to make such assessment, goes far beyond the limitation of privacy and the protection of personal data.¹⁴³ Also, the burden imposed on operators (~ liability and damage claims) and the deterring effect on customers is unacceptable.

¹⁴¹ See Article 33h of the draft law.

¹⁴² See letter of the Danish Data Protection Agency to the Danish Gambling Authority regarding the hearing on the draft executive order on online casinos, of 2 February 2011 and 12 April 2011.

¹⁴³ See Article 31(n), 2nd indent of the draft law.

5.4 Industry recommendation

Considering the above, the private industry requests the exclusion of ISP and PSP mechanisms, due to their overall inefficiency and the legal uncertainty surrounding them. The best guarantee against non-Dutch regulated gambling is the highest possible level of channelling whereby the highest number of players using the available regulated offer. This can be achieved through a manageable licensing system whereby the operator's needs and the consumer's wishes are united.

In addition, the online industry urges the government, with the help of the DPA, to execute a thorough and comprehensive privacy assessment to achieve a balanced data processing in respect of every player's right to privacy.

6 Miscellaneous

6.1 Secondary legislation

Several essential aspects are not defined in the draft law and are referred for specification to secondary legislation which will be drafted at a later point in time. While the online industry understands that not all aspects can and should be tackled in the draft law, it is very difficult to agree to certain points on a variety of topics in the context of the draft law which could be given a far-reaching interpretation in detailed secondary legislation.

6.2 The scope of license

RGA-EGBA welcomes the proposed structure of the online license, whereby a single license is awarded to the B2C operator of the online gambling service. This is not only aligned with current practises in the Netherlands and most other EU Member States, but also acknowledges that the licensed B2C gambling operator (“Operator”) and the B2B product supplier (“Supplier”) have different roles and responsibilities, all of which can be fully channelled via the licensed operator as single interface to the customer they contract with and the National Regulatory Authority (NRA) that issued the license.

With this approach a holistic balance is established between:

- 1) Ensuring that operators of any kind of online gambling activity need to meet the same high level of requirements in a non-discriminatory and transparent manner;
- 2) Ensuring that the administrative and cost burden associated with effective compliance with legal requirements in a proportionate and efficient manner.

While the supplier and operator interact in the provision of online gambling services, for instance the back-office integration of an online casino product into the online gambling platform of the operator, the focus of regulatory scrutiny and compliance review should remain vested with the online operator who is responsible and in charge of the relationship with the end-customer. While requirements may be imposed on product level, it is the operators’ primary duty to ensure:

- That the service, including products offer, are fair, reliable and in accordance with applicable legal requirements, including regulatory audit and full liability to any subcontractor it engages
- Consumer protection, notably responsible gambling and data protection (product suppliers do not have access to player data, nor do they intervene in the KYC process)
- Gaming account management, including managing of payment processes, AML and player balances (product suppliers do not hold customer funds)

The primary relationship between the operator and regulator does not preclude a product supplier from establishing his own relationship with a regulator e.g. in the context of information gathering and technical product requirements.

If gaming policy objectives could not be covered off by an online license of B2C operators, we could see limited net added value for so-called product licenses, provided that:

- 1) The burden applicable to product licenses is justified by the objective pursued and there is no alternative manner to achieve the same objective

- 2) It does not add complexity to the overall licensing model, which to the experience of the online industry, usually does
- 3) It remains at all times 100% clear who is accountable for what, which in a single license model to the operator by default means the operator
- 4) This does not lead to double taxation on the same GW revenue stream
- 5) This does not lead to digital market fragmentation on a product level, and leading to sub-optimal product quality (choice and inherent product quality) undermining the overall channelling objective

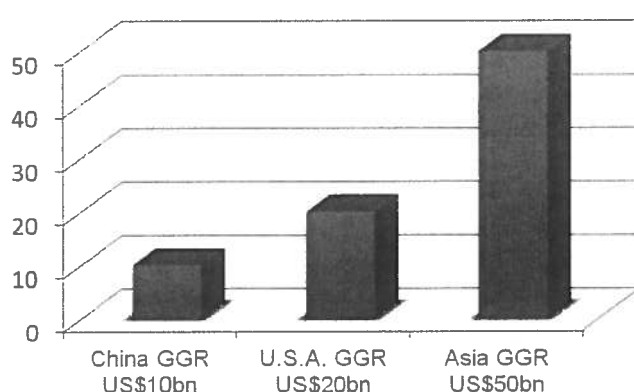
In Spain, for instance, product suppliers are subject to the same license obligations as operators. Besides creating market entry barriers on a product level, it above all adds overall complexity and costs to the licensing scheme with no clear benefit. RGA-EGBA understands that the Spanish regulator is contemplating to change its licensing model and while only impose a license obligation on the online operator, maintain requirements on a product level.

6.3 Corruption in sports, including Match Fixing

6.3.1 Corruption in sports undermines the regulated industry's businesses

The prevention of corruption in sports, including match-fixing is a key priority for the European licensed betting industry (*herewith the 'regulated betting industry'*). If a participant manipulates a game so that a bettor knows what the outcome of an event will be, the betting operator will lose money and see his reputation damaged resulting in a loss of income.

Figure 9: Size of the unregulated gambling markets¹⁴⁴



Current evidence shows that match-fixing is mostly associated with unregulated markets – particularly from Asia as recognised by Europol¹⁴⁵, the International Olympic Committee¹⁴⁶, as well as the European Commission in as early as 2011.¹⁴⁷

¹⁴⁴ See H2 Gambling Capital.

¹⁴⁵ See BBC news coverage of 4 February 2013, <http://www.bbc.co.uk/sports/0/football/21319807>.

¹⁴⁶ See statement of the IOC, <http://www.olympic.org/sports-for-all?&articleid=118681>.

¹⁴⁷ See conclusions of the European Commission's Expert Workshops on online gambling, http://ec.europa.eu/internal_market/services/docs/gambling/workshops/workshop-i-conclusions_en.pdf.

6.3.2 Licensing fees must cover monitoring and detection mechanisms

The fight against match-fixing constitutes one of the many one of the many regulatory objectives that the licensed betting industry is required to meet. In this view, the Dutch modernisation process will be an important step in the right direction, notably as it allows structural cooperation and the sharing of information between the government, sports federations and the online industry. Moreover and as part of the operator's general compliance obligations, including KYC/KYT as part of its Internal Control System, operators should be enabled and obliged to report any suspicious activity, including betting activity to the regulator (KSA). The licence fees and Regulatory levy (1.5% GW) paid to national regulators (should) cover all the integrity detections and investigations. In addition, the regulated betting industry continues to invest in sophisticated security measures. Due to the transparency generated by new technologies and the traceability of bettors and transactions ("who bets on what"), these measures allow the online industry to detect and deter those that would seek to manipulate sporting events in order to defraud operators, their consumers, and fans of sports. The European Sports Security Association (ESSA) identified 109 irregular incidences in 2012 with 6 turning out to be suspicious. The detailed case files for these incidents were subsequently sent to the relevant sports governing and regulatory bodies. These data are very much aligned with data from other public bodies in the UK (SBIU), France (ARJEL) and Belgium (*voetbalcel*).¹⁴⁸

6.4 Betting industry offer needs to meet consumer demand

Kicking corruption out is only possible if sports betting markets are regulated in a balanced way in which the interests of betting operators, the world of sports and consumers are taken into account. Restrictions on the betting product, including markets on offer or so called "live or in-play bets" in that context can be counter-productive and are often – if not always – based upon an inaccurate or incomplete understanding of the product and related facts. . These so-called live bets are incredibly popular with customers (industry trend indicate that they represent is +50 of the total betting market), and subject to even more extensive risk analysis which may result in lower betting limits depending on the circumstances and increased compliance and monitoring. By lowering the betting limits on live bets and hence their liquidity, the industry is taking initiatives to ensure that these bets meet the demands of the betting public whilst at the same time reduce the appeal of such bets to those who may seek to profit from corruption in sports. Consumers want and enjoy these types of bets and if the full range of markets cannot be offered by licensed operators then consumers will go towards non-Dutch regulated markets, which will only increase the threat to sports' integrity.

There is a growing and unsubstantiated view that match-fixing can be addressed by limiting the betting markets offered by licensed and regulated operators, and in particular what some have inaccurately termed 'high-risk' bets such as in-play betting. These assertions lack detailed supporting evidence and misunderstand the intricacies of the market and consumer behaviour.

Firstly, corrupters actually seek to manipulate the more mainstream markets with higher liquidity, which clearly could not be banned, and any attempt to do so would have the undesirable effect of pushing consumers towards the non-Dutch regulated market, which has no transparency or accountability and would be virtually impossible to monitor.

¹⁴⁸ The Belgian Coordination unit (*voetbalcel*) reported 18 reports in 3 years. The French Regulator (*Arjel*) investigated in the period June 2010 and May 2013, 70 events and referred 4 to sports governing bodies for further follow-up, and the most recent data of the Sports Betting Intelligence Unit of the UK Gambling commission makes reference to 93 disclosures, of which 49 have been closed where the information has been referred to external agencies or where the commission was unable to substantiate suspicions.

Secondly, as Europol and others have detailed, match-fixers bet primarily on the Asian market which is often unregulated and as such is not subject to any restrictions or cooperation obligations. There is simply no evidence to support limits on regulated betting markets, which would be an unjustified restriction on trade, based on unsubstantiated integrity grounds. Such market limitations would put European licensed operators at a clear disadvantage and be of no benefit to integrity issues.

Indeed, the British Gambling Commission conducted an examination and wide ranging consultation of the potential regulatory risks for both the betting and sporting sectors in relation to the availability of betting markets, which resulted in the publication of two position papers¹⁴⁹. As an independent regulatory authority which oversees one of the most significant betting markets in the world, it has access to a considerable amount of betting information, along with the knowledge and expertise from both the licensed betting and UK sporting sectors.

With regard to the argument for limiting betting markets on integrity grounds, the Commission which “works on the principle of risk based regulation and must act in a proportionate manner,” determined that it was “not persuaded that there is a sufficient case for restricting types of bets”. RGA-EGBA fully supports this evidence-based analysis.

There is also a growing view that online betting creates corruption in sport. Again, it is important to differentiate between the licensed and unlicensed sectors. Licensed online betting has actually facilitated increased security for sports, the state, consumers and the regulated betting market. Modern digital technologies have allowed us to develop far more efficient and effective anticorruption measures, notably customer verification details (KYC) and electronic payments (KYT). In other words, regulated online operators are the only ones that know who is betting on what and can use that key information to support public policy.

6.5 Funding education programs for players: EU Athletes case study

Athletes are the first line of defence against match-fixing. They should be educated about the basic rules of engagement, namely the fact that it is safest for them not to bet on events that they are involved in or have privileged information about. It is actually the absence of rules within sports federations that prompted EU Athletes, Europe’s leading athletes’ federation, to approach in 2010 the EGBA and its members to fund a face-to-face education program. The importance of education has now been acknowledged by many stakeholders, and in 2012 the European Commission decided to co-fund this initiative (along with 4 other initiatives)¹⁵⁰ which is based upon the following guiding principles:

- Know the rules
- Play safe: don’t bet on your sports
- Be careful when handling sensitive information
- Fixing any part of an event is an absolute No-No
- Report any approaches
- Fixers will be caught: All suspicious bets are monitored.

¹⁴⁹ UK Gambling Commission Betting Integrity Policy Position Paper of March 2009, available at <http://secure.gamblingcommission.gov.uk/pdf/Betting%20integrity%20policy%20position%20paper%20-%20March%202009.pdf> and UK Gambling Commission In-running (in-play) betting position paper of March 2009, available at <http://www.gamblingcommission.gov.uk/pdf/In-running%20betting%20position%20paper%20-%20March%202009.pdf>.

¹⁵⁰ http://ec.europa.eu/sports/preparatory_actions/results-eac-06-2012_en.htm.

The online industry endorses the importance of education and shares the view that Member States, such as the Netherlands, should make funds available for targeted educational campaigns.

6.6 Financing of charity and sports: General remarks

It should be stressed that charities are mainly financed by lotteries and under the current proposal this would not be affected neither substituted. On-going developments in the sector are an opportunity for the funding of sports as illustrated by the increasing number of commercial agreements with sports organisations.

The best way to secure an optimum of financial flows and a “fair return” from gambling and betting operators to sports is through the enforcement of EU Competition and Internal Market rules in a systematic and consistent way. In a regulated and competitive market, the online industry can generate new and diversified sources of revenue for both grassroots and professional sports.¹⁵¹

An increasing number of sports clubs and federations around Europe have entered into audio-visual rights, live streaming and sponsorship deals with online sports betting operators.

- **Sponsorship agreements:** The number of gambling operators becoming leading shirt sponsors in the top 5 markets in Europe grew from 1 in 2002/3 to 26 in 2010/11.¹⁵² In addition, gambling sponsors were jointly ranked on the 7th place of all business sectors in terms of worldwide reported deals in 2011, with 73 gambling sponsorship deals reported in 2011 compared to 21 in 2007, making the sector one of the fastest rising sectors on the list, with almost 350% growth in five years.¹⁵³ These agreements allow them to have access to image rights of players and trademarks.
- **Live streaming agreements:** The financial scope of the live streaming market of sport events is considered to be in the order of €80 M. These agreements, which include more than 30 different sports, do not only financially and structurally support top leagues/sports but also grass-roots sports that have low media exposure financially and structurally.
- In France, for the year 2011, for every single EUR that went to the sports right, circa 21 EUR went to sponsorship deals and 200 EUR to other media expenditure.
- In France the betting right generates annually circa 1.2m EUR (mainly allocated to elite football and tennis). Furthermore, whereas in the last 2 years over 200 million bets were organised, ARJEL only investigated 70 cases and referred only 4 cases to the competent Sport Governing Body (SGB) for further processing. The only known French incident was with handball and with retail outlets of La Française des Jeux (FDJ) (outside betting right). These numbers align very much with numbers in Belgium (18 reports in 3 years), ESSA (around 8 per annum), UK (Sport Betting Intelligence Unit 2012: 93 reports, 49 closed due to lack of info) and the findings of Coventry report¹⁵⁴ (for every match fixing case there are still 62 doping cases).

¹⁵¹ European Commission workshop on online gambling and systems of revenue distribution, June 2011

¹⁵² Sports + Markt 'Sports, Gambling & Sponsorship: The Financial Relationship' presentation, September 2010

¹⁵³ The World Sponsorship Monitor, 2011

¹⁵⁴ “The Prevalence of Corruption in International Sport. A Statistical Analysis”, November 2011, available at http://www.rga.eu.com/data/files/Press2/corruption_report.pdf.

- It is worth noting that 2.1 EUR is provided by the gambling industry to sports, which corresponds to 62% of the total.¹⁵⁵
- According to the 2008 Study on the contribution of the Gambling Industry to the funding of sports in the UK and France, similar contributions were made in the UK and France, but they were structured differently. In the UK model, the majority of the funding was found to be self-generated or commercial, via e.g. sponsorship or other forms of cooperation. The study concluded that an adapted good legal framework allowing cooperation between gambling and sports is a win-win.¹⁵⁶
- According to the EU study on the funding of grassroots sports in the EU, grass roots sports is for only 2% financed from gambling monopolies, which remains a structural source of revenue (market size of land- based lotteries vs. 10% for online).¹⁵⁷

6.7 Financing of sports in the Netherlands

RGA-EGBA understands the importance of sports in society, notably grass root sports. While we understand that certain questions – even fears – may arise as to the impact of the proposed modernisation of the Dutch gambling policy on the financing of sports, RGA-EGBA hopes to provide some comfort and guidance to these concerns. While acknowledging that Dutch lotteries contribute around 60 million EUR per annum to sports, we are confident that on the basis of the proposal there is no risk involved as:

- 1) Lotteries are not included in the proposal, and while arguments may exist to include it in the product scope and/or the license allocation process, for the time being structural revenue from lotteries is not jeopardised.¹⁵⁸
- 2) The contribution from lotteries to the overall sports financing budget is relatively small (1.1%).

The Study on the funding of grassroots sports in the EU, which was conducted on behalf of the European Commission in 2011 and focussed on the internal market aspects concerning legislative frameworks and systems of financing, found that the *“revenue from lotteries only accounts for 1% of the total budget of the sport system”* and that the *“households are the main contributors to the funding of sport in The Netherlands”*. The study found that whereas *“80.4% of the sector’s revenue comes from private contributions, and 71.6% from households, the public sector’s share is less than 20%”*.¹⁵⁹ The table below clearly indicates that in 2008 only 106 Million Euros revenue came from Lotteries and 740 million Euros from private companies, including the online gambling industry

¹⁵⁵ See “The Prevalence of Corruption in International Sport. A Statistical Analysis”, November 2011, available at http://www.rga.eu.com/data/files/Pressrelease/sports_betting_web.pdf.

¹⁵⁶ See EGBA press release, 2008, available at <http://www.egba.eu/en/press/422>.

¹⁵⁷ Eurostrategies consortium, from national sources and surveys, cited in the Study on the funding of grassroots sports in the EU With a focus on the internal market aspects concerning legislative frameworks and systems of financing, p.174, available at <http://ec.europa.eu/sport/library/documents/f-studies/study-funding-grassroots-sports-finalreport-vol2.pdf>.

¹⁵⁸ We note that the revenue contribution from De Lotto’s sports betting product should – on a pro rata basis – be non-material as sports betting is 10% of De Lotto’s total revenue across all its products . Compared to the total revenue generated from all lotteries, the relative contribution of De Lotto’s sports betting will even be smaller than 10%.

¹⁵⁹ Eurostrategies consortium, from national sources and surveys, cited in the Study on the funding of grassroots sports in the EU With a focus on the internal market aspects concerning legislative frameworks and systems of financing, p.174, available at <http://ec.europa.eu/sport/library/documents/f-studies/study-funding-grassroots-sports-finalreport-vol2.pdf>.

Figure 10: Financial Resources going into sport¹⁶⁰

REVENUE FROM (2008):	MILLION €	SHARE OF TOTAL	€ PER
General government of which:	1904,4	19,6	115,4
– Central government	1004,4	10,4	60,9
– Ministry in charge of sport	110,0	1,1	6,7
– Other governmental entities	894,4	9,2	54,2
– Local authorities	900,0	9,3	54,5
Private stakeholders of which:	7792,0	80,4	472,2
– Household's expenditures on sport	6946,0	71,6	421,0
– Lotteries, betting and gambling through compulsory levy	106,0	1,1	6,4
– Companies (sponsoring, donations, others)	740,0	7,6	44,8
Total revenue	9696,4	100,0	587,7

6.8 Industry recommendations

European licensed operators have a clear business need to ensure the integrity of sporting events and their associated products. The modern digital technologies employed by the online industry have allowed operators to develop more efficient and effective anti-corruption measures. Such tools should be harnessed through practical and proportionate cross-sector and multi-jurisdictional partnership agreements as demonstrated during the 2012 London Olympic Games.

It is vital that any solutions are practical, proportionate and evidence-based following detailed discussions with all stakeholders. Implementing arbitrary limits on regulated European betting markets would be an unjustified restriction on trade and be of no clear integrity benefit given that this activity is primarily perpetrated by criminals using the unregulated Asia betting market. Solutions must also include a range of activities, including addressing poor sports governance.

¹⁶⁰ Eurostrategies consortium, from national sources and surveys, cited in the Study on the funding of grassroots sports in the EU With a focus on the internal market aspects concerning legislative frameworks and systems of financing, p.174, available at <http://ec.europa.eu/sport/library/documents/f-studies/study-funding-grassroots-sports-finalreport-vol2.pdf>.

RGA-EGBA, together with ESSA, is of the firm opinion that the Dutch reform of its gambling bill will enable the structural cooperation between the key stakeholders (sports – state – operators) and concludes that the provision of online betting services under a Dutch license will strengthen the shared concern to preserve the integrity of sports. Under a Dutch online license, the operator's general compliance obligations, including KYC/KYT as part of its Internal Control System, should entail to report any suspicious activity, including betting activity to the regulator (KSA). The financing of sports will not be jeopardised, and based upon experience in other jurisdictions, RGA-EGBA share the opinion that the proposed model will create new possibilities to cooperate and provide financial support to sports.

The industry would be delighted to discuss establishing an information sharing agreement with the Dutch regulatory authorities as part of that process, as we have established with comparable bodies in other countries which licence remote gambling such as the UK, Malta, Gibraltar and Alderney. We are of course also open to similar discussions with any national sporting bodies.

II. EU framework

1 Background - EU primary and secondary law

European demand for online gambling services continues to grow steadily and the industry is one of the few IT sectors where Europe is a world leader, representing approximately 45% of the global online gambling market.¹⁶¹ Even if, as it is accurately noticed in the draft law, “there is no sector specific legislation on games of chance at EU level”¹⁶², the online gambling sector has already been covered by secondary legislation¹⁶³, inter alia consumer protection, unfair commercial practices¹⁶⁴, e-commerce¹⁶⁵, misleading advertising, distant selling¹⁶⁶, e-privacy¹⁶⁷ as well as data protection¹⁶⁸, and the increasing incorporation of gambling services in the EU regulatory framework, such as the AML directive, reflects the inherent cross-border nature of the sector. The application of EU primary and secondary legislation imposes limitations to and requirements on Member States’ gambling legislation. In the meantime, Member States have developed a number of cooperation mechanisms to exchange good practices, most notably in the field of consumer protection.¹⁶⁹

¹⁶¹ Commission Staff Working Document, Online gambling in the internal market, page 9 available at http://ec.europa.eu/internal_market/gambling/docs/121023_online-gambling-staff-working-paper_en.pdf.

¹⁶² Explanatory Memorandum, Ch.9. EU Law, p. 37.

¹⁶³ Directive 2000/31/EC (Directive on electronic commerce) (available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:178:0001:0001:EN:PDF>); 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) (available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1998L0034:20070101:EN:PDF>); Directive 97/7/EC on the protection of consumers in respect of distance contracts (available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997L0007:en:NOT>); Directive 97/55/EC (concerning misleading advertising) (available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997L0055:EN:HTML>); Directive 2005/29/EC (Unfair Commercial Practices) (available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:149:0022:0039:en:PDF>); Directive 95/46/EC (on data protection) available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995L0046:en:HTML>; Directive 2005/60/EC (anti-money laundering directive) (available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:309:0015:0036:en:PDF>).

¹⁶⁴ Unfair Commercial Practices Directive (2005/29/EC) has been implemented via ‘Boek 3’ and ‘Boek 6’ of the ‘Burgerlijk Wetboek’. The implementation also required some minor amendments to others acts, a full overview of all amendments is available at http://www.eerstekamer.nl/behandeling/20081014/publicatie_wet/document3/f=w30928st.pdf.

¹⁶⁵ E-commerce Directive (2000/31/EC) has been implemented via ‘Boek 3’ and ‘Boek 6’ of the ‘Burgerlijk Wetboek’. This implementation also required some minor amendments to others acts, a full overview of all amendments is available at http://www.eerstekamer.nl/behandeling/20040525/publicatie_wet_7/document3/f=w28197st.pdf.

¹⁶⁶ Distance Selling Directive (97/7/EC) has been implemented via ‘Boek 7’ of the ‘Burgerlijk Wetboek’, available at http://www.eerstekamer.nl/behandeling/20001228/publicatie_wet_9/document3/f=w26861st.pdf.

¹⁶⁷ E-privacy Directive (2002/58/EC) has been implemented via the ‘Telecommunicatiewet’. This implementation also required some minor amendments to others acts, a full overview of all amendments is available at http://www.eerstekamer.nl/behandeling/20040513/publicatie_wet_2/document3/f=w28851st.pdf.

¹⁶⁸ Data Protection Directive (95/46/EC) has been implemented via the ‘Wet Bescherming Persoonsgegevens’, available at http://www.eerstekamer.nl/behandeling/20000706/publicatie_wet_2/document3/f=w25892st.pdf.

¹⁶⁹ See for example: Council of the European Union, “Conclusions on the framework for gambling and betting in the EU Member States” (available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/intm/118398.pdf).

These directives¹⁷⁰ however do not cover all aspects of consumer protection for online gambling and for those areas that have not (yet) been harmonised, the Workshop Agreement on Responsible Remote Gambling Measures of the European Committee on Standardisation (CEN) and the experience in other Member States can serve to inform the Dutch government of best practises when drafting secondary legislation.¹⁷¹ The intention of the Dutch government to align certain aspects of the new law with the Consumer Rights Directive can also be supported.

As announced in its communication on online gambling entitled "*Towards a comprehensive European framework for online gambling*" (the "Communication") adopted in October 2012, the European Commission will, as one of the key measures, adopt a recommendation with the aim of providing a high level of common consumer protection and good practices with a particular focus on player identification controls, financial and temporal limit setting, and exclusion possibilities. This recommendation will also impact national enforcement policies

Whereas national regulatory frameworks on gambling tend to share the same aims (i.e. protect consumers, prevent fraud, money laundering, match-fixing), even small deviations in implementing those goals at national level mean unnecessary and high compliance costs for multi-licensed EU operators. These costs will inevitably be reflected in consumer prices, handing a competitive advantage to non-Dutch regulated operators.

The European Commission highlights in the Communication that "*the development of an attractive range of legal gambling opportunities is key to effectively prevent consumers from going on unregulated sites*"¹⁷², which objective simultaneously lies at the hearth of the Explanatory Memorandum.¹⁷³

In the meantime the European Commission has undertaken first actions preparing the ground for further harmonisation of the sector, recognising the significance of the sector, but also outlining a number of actions to address evident regulatory challenges, such as enhancing administrative cooperation, consumer protection and responsible advertising.¹⁷⁴

The Commission also committed itself to publish an assessment report within two years and decide whether "*additional measures, where necessary legislative ones, need to be taken at EU level*".¹⁷⁵

¹⁷⁰ As transposed in Dutch law by Act on unfair commercial practices ("Wet oneerlijke handelspraktijken"); the Data Protection Act ("Wet Bescherming Persoonsgegevens"); Telecommunications Act ("Wet houdende regels inzake de telecommunicatie"); Consumer Protection Act ("Wet handhaving consumentenbescherming"); Distant Selling Act ("Wet bescherming van de consument bij op afstand gesloten overeenkomsten").

¹⁷¹ European Committee for Standardization (CEN) Workshop Agreement (CWA 16259:2011), Responsible Remote Gambling Measures, January 2011, available at <http://www.cen.eu/cen/News/PressReleases/Pages/ResponsibleRemoteGamblingMeasures.aspx>.

¹⁷² Communication, *Towards a comprehensive European framework on online gambling*, p. 6, European Commission 2012 (available at <http://ec.europa.eu/sport/documents/comm-121023-onlinegambling.pdf>).

¹⁷³ Explanatory Memorandum, Introduction, page 3.

¹⁷⁴ These issues are currently being discussed in expert groups consisting of Member States representatives. So far, four meetings of expert groups took place (on 5 December 2012, 12 February 2013, 16 April 2013 and 11 June), more information available at http://ec.europa.eu/internal_market/gambling/expert-group/index_en.htm.

¹⁷⁵ Communication, *Towards a comprehensive European framework on online gambling*, p. 18, European Commission 2012 available at <http://ec.europa.eu/sport/documents/comm-121023-onlinegambling.pdf>.

1.1 European Commission as Guardian of the Treaties to ensure the Member States' compliance with EU law

The key priority on the European Commission's agenda is to ensure that Member States' legislations comply with EU law. Member States have the right to set the level of consumer protection and the related regulatory level of market regulation. Some Member States established national monopolistic regimes, though a growing number of Member States have recently opened up their markets. Nonetheless, notwithstanding their respective regimes, Member States are obliged to comply with EU law and make sure that measures in place are transparent, non-discriminatory and proportionate, whilst actually ensuring attainment of the objectives pursued in a consistent and systematic manner.¹⁷⁶ Member States whose legislation is not EU compliant could be subject to an infringement procedure. Commissioner Barnier announced, after four years of inaction and regulatory limbo, to re-launch infringement proceedings, including referrals of Member States to the CJEU, against 9 Member States¹⁷⁷, and to investigate the gambling laws of 20 Member States¹⁷⁸ following complaints, including the Netherlands. First decisions are expected after the summer of 2013.

1.2 Self-regulatory initiatives

Meanwhile, and in absence of a harmonized framework, the industry has been simultaneously applying and complying with a range of self-regulatory instruments. One of the most substantial initiatives was the Workshop Agreement "Responsible Remote Gambling Measures" ("CWA") published in 2011 by the European Committee for Standardization (CEN).¹⁷⁹ The agreement is a set of 134 practical measures aimed at safeguarding a particularly high level of consumer protection and ensuring that remote gambling operators act and behave responsibly in the European Union. The CWA informs policy makers of the standards required to maintain a responsible, safe and secure remote gambling environment.

In order to ensure the proper protection of the customer on as many levels of gambling as possible, the CWA defines 9 objectives including:

- The protection of vulnerable customers (i.e. combating problem gambling, accessible consumer information, self-exclusion and cooling-off periods);
- The prevention of underage gambling (i.e. third-party age and ID verification, filtering programs);
- Combating fraudulent and criminal behaviour (implementation and enforcement of strict security measures, reporting of any suspected transactions);
- Protection of customer privacy and safeguarding of information (i.e. the secure storage of credit card details);
- Prompt and accurate customer payments (i.e. the logging of all information regarding receipts and payments and the use of appropriate checks and verification);
- Fair gaming (i.e. identifying suspicious sport betting transactions);

¹⁷⁶ The European Commission emphasised that "ensuring compliance of national law with the Treaty is [...] a prerequisite of a successful EU policy on online gambling", *Ibid.* page 5.

¹⁷⁷ Including Germany, Greece, the Netherlands, Hungary, Greece, Sweden and Finland (available at http://ec.europa.eu/internal_market/services/gambling_en.htm).

¹⁷⁸ EC memo 'Online Gambling in the Internal Market, FAQ', available at http://ec.europa.eu/commission_2010-2014/barnier/index_en.htm, page 3

¹⁷⁹ European Committee for Standardization (CEN) Workshop Agreement (CWA 16259:2011), Responsible Remote Gambling Measures, January 2011 (available at <http://www.cen.eu/cen/News/PressReleases/Pages/ResponsibleRemoteGamblingMeasures.aspx>).

- Responsible marketing (i.e. ensuring advertising is not aimed at underage individuals and does not suggest gambling is a means of solving financial difficulties);
- Commitment to customer satisfaction and support (i.e. proper handling of customer complaints),
- Secure, safe and reliable operating environment (i.e. risk-based internal and external security reviews)

Another noteworthy initiative is the RGA Technical Guidelines¹⁸⁰ for the online gambling industry which constitutes a compilation of good practice industry standards concerning:

- Customer registration and accounts (identification, account security, use of customer data, etc.);
- Customer protection (responsible gambling, self-help tools, complaints, etc.);
- Product guidance (RNG's, fairness, suspicious betting patterns, etc.);
- Third party system disclosure guidelines;
- Security guidelines;
- Data logging guidelines;
- Shutdown and recovery;
- Advertising and marketing;
- Anti-Money Laundering (AML) guidelines; and
- Compliance and Internal Control Systems (ICS).

1.3 Compatibility with Treaty principles - Jurisprudence of the Court of Justice

The explanatory memorandum makes reference to EU Treaty principles and the jurisprudence of the CJEU but fails to render a full and correct reproduction of the standing principles set out therein. It is based upon a narrow view of fundamental EU rights and binding principles of EU law, and disregards nuances made in subsequent fundamental jurisprudence of the CJEU, e.g. by simply qualifying EU licensed operators as illegal.

While the CJEU has acknowledged that the fundamental freedoms of the EU Treaty may be restricted in certain circumstances, it has clearly outlined and limited the reasons why a Member State may derogate from a fundamental freedom: such restriction must be accompanied by an analysis of the appropriateness and proportionality of the restrictive measure adopted by that Member State and by statistical or other precise evidence enabling the necessity for and proportionality of the measures adopted to be evaluated.¹⁸¹

According to the CJEU's standing jurisprudence, non-discriminatory national restrictions on the freedom to provide and receive services can only be justified if (i) they serve imperative requirements in the public interest; (ii) are suitable for achieving the objective which they pursue;

¹⁸⁰ RGA, "Technical issues - Good practice guidelines for the remote gambling industry", available at www.rga.eu.com/data/files/rga_technical_guidelines.pdf.

¹⁸¹ Court, judgment of 18 March 2004 in Case C-8/02 *Leichtle* [2004] ECR I-2641, para. 45 et seq.; Court, judgment of 7 July 2005 in Case C-147/03 *Commission v Austria* [2005] ECR I-5969, para. 63; Court, judgment of 13 March 2008 in Case C-227/06 *Commission v Belgium* [2008] ECR I-46, para. 63; Court, judgment of 19 June 2008 in Case C-319/06 *Commission v Luxembourg* [2008] ECR I-04323, para. 51 et seq.; Court, judgment of 22 December 2008 in Case C-161/07 *Commission v Austria*, [2008] ECR I-10671, para. 36 et seq.

and (iii) do not go beyond what is necessary in order to attain it.¹⁸² A number of the restrictions and requirements put forward in the draft law do not comply with these standing jurisprudence principles and go against the fundamental freedoms of EU law, e.g. mandatory localization of the primary gaming server, restriction of the product scope, duplication of requirements already in place, potential privacy law infringements, etc.

It is indispensable that the new Dutch regulation is in line with EU law and creates equal market access conditions for online operators. Only if provided with an attractive, competitive and EU-compliant local licensing regime, the channelling rationale can be achieved and the highest level of consumer protection can be attained. An unattractive gambling model will inevitably lead to an underdeveloped regulated system with sub-optimal channelling (and a persistent non-Dutch regulated market targeting Dutch customers), ultimately jeopardising the protection of Dutch players.

Incompatibility of the new gambling law with EU law could trigger a number of consequences. Firstly, enforcement of the new law against non-Dutch regulated operators would become problematic. Secondly, if the new law were to breach EU law, it is susceptible to litigation and damage claims or other legal action. Last but not least, the European Commission could well open a new infringement case against the new law for failing to comply with EU law.

1.4 Overview of CJEU jurisprudence

1.4.1 Consistency: Sliding scale concept

The most important firmly established principle in the CJEU's jurisprudence relating to gambling is the overarching consistency requirement deduced from the general principle of proportionality. Across the entire gambling legislation that a Member State adopts, a Member State must adhere to the proportionality requirement, without any exceptions, between the degree of regulatory restriction and the level of risk with regard to the pursued legitimate objective.

As stated above, restrictions of fundamental freedoms may be justified if they are non-discriminatory, proportionate and are based on imperative requirements in the general interest. Over the years, the CJEU's jurisprudence has been characterized by a particularly detailed and strict assessment of the consistency requirement in terms of identification and verification of the invoked objective of the gambling policy.

In the *Schindler* judgement, the CJEU considered that gambling activities are covered by the freedom to provide services (subsequent Article 56 TFEU) and that consumer protection and crime prevention are among the imperative requirements that could in principle justify restrictions of gambling activities. Such restrictions however must be in line with the principle of proportionality.¹⁸³

In the *Gambelli* judgment, the CJEU specified that while each Member State is free to define its own level of protection, its regulation must not be discriminatory, must not go beyond what is necessary

¹⁸² Court judgment of 6 November 2003 in Case C-243/01 *Gambelli and others* [2003] ECR I-13076, para. 65; Court judgment dated 6 March 2007 in Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica and others* [2007] ECR I-1891, para. 49.

¹⁸³ Court, judgment of 24 March 1994 in Case C-275/92 *Her Majesty's Customs and Excise v. Gerhart Schindler and Jörg Schindler* [1994] ECR 1039 paras. 16 et seq.

and “must also be suitable for achieving the (identified) objectives, inasmuch as they must serve to limit betting activities in a consistent and systematic manner”.¹⁸⁴

All subsequent gambling-related CJEU judgments since then have confirmed and further contextualized this consistency requirement. The *Placanica* judgment of 2007 followed the same line, as it permitted only a controlled expansion and this only in exceptional situations where there is a proven need to channel the demand for games rather than to reduce gambling opportunities.¹⁸⁵ The Advocate-General held that there can be no criminal enforcement unless a local licence scheme in accordance with EU law is in place:

“135. Where the punishment imposes a measure contrary to Community law, the enforcement of that measure by criminal penalties must all the more conclusively (105) have to be regarded as an infringement of Community law, since both rules are interstices in a net which has to interlace with another further up: they are not watertight compartments. It is not for the Court of Justice to choose, (106) but it does have to make sure that the choice made is compatible with Community law.

139. With regard to the intermediary, the Court also advised the national court to determine whether the restrictions went beyond what was necessary to combat fraud, since the supplier of the services was subject in his Member State of establishment to a regulation entailing controls and penalties”¹⁸⁶.

In the landmark judgments *Carmen Media*¹⁸⁷ and *Markus Stoß*¹⁸⁸ of 2010, the CJEU considered the German gambling legislation to violate the consistency principle by holding:

“71. [...] on a proper interpretation of Article 49 EC, where a regional public monopoly on sporting bets and lotteries has been established with the objective of preventing incitement to squander money on gambling and of combating gambling addiction, and yet a national court establishes at the same time:

– that other types of games of chance may be exploited by private operators holding an authorisation; and

– that in relation to other games of chance which do not fall within the said monopoly and which, moreover, pose a higher risk of addiction than the games which are subject to that monopoly, the competent authorities pursue policies of expanding supply, of such a nature as to develop and stimulate gaming activities, in particular with a view to maximising revenue derived from the latter;

that national court may legitimately be led to consider that such a monopoly is not suitable for ensuring the achievement of the objective for which it was established by contributing to reducing the opportunities for gambling and to limiting activities within that area in a consistent and systematic manner.”¹⁸⁹ (Underscore added)

¹⁸⁴ *Gambelli*, paras. 63 et seq., 67.

¹⁸⁵ *Placanica*, paras. 52 et seq.

¹⁸⁶ Opinion of the Advocate-General of 16 May 2006 in Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica* paras, 135 and 139.

¹⁸⁷ Court, judgment of 8 September 2010 in Case C-46/08 *Carmen Media Group Ltd v. Land Schleswig-Holstein, Innenminister des Landes Schleswig-Holstein*, [2010] ECR 08149.

¹⁸⁸ Court, judgment of 8 September 2010 in Joined Cases C-316/07, C-358/07 to C-360/07, C-409/07 and C 410/07 *Markus Stoß, Avalon Service-Online-Dienste GmbH v. Wetteraukreis and Kulpa AutomatenService Asperg GmbH, SOBO Sport & Entertainment GmbH, Andreas Kunert v. Land Baden-Württemberg*, [2010] ECR 08069.

¹⁸⁹ *Carmen Media*, para. 71, which is very similar to *Stoß*, para. 107.

The importance of these rulings lies in the fact that the CJEU compares the degree of regulatory restriction for the types of games covered by the monopoly with the degree of restriction applied to other types of games that are not covered by the monopoly. The CJEU found an overall inconsistency between the very restrictive policy applied to certain games by way of a monopoly, the exploitation by private operators of other types of games, and the pursuit of an expansive policy with regard to certain other types of games that pose higher addiction risks.

Thus, the *Carmen Media* and *Markus Stoß* judgments have established an overarching consistency requirement, which applies across the entire gambling legislation of a Member State. A Member State has to regulate all the types of games in its territory in a consistent and systematic manner, without any exceptions.

The CJEU found that the consistency requirement fully applies to online gambling since effective consumer protection can only be ensured if regulation achieves the same level of consumer protection throughout all channels.¹⁹⁰ In its *Zeturf* judgment, the CJEU ruled that:

“76. The objectives of the national legislation are intended above all to ensure the protection of consumers of games of chance and, more specifically, to ensure protection against fraud committed by operators as well as against incitement to squander money on gambling and against addiction to gambling, a consideration that is certainly relevant is the degree of substitutability between the various marketing channels from the point of view of the consumer. In so far as it is established, for example, that consumers consider placing an individual bet on horseracing by the internet as a substitute for placing that same bet by the traditional channels that militates in favour of an overall assessment rather than a separate assessment for each distribution channel of the sector.”¹⁹¹ (Underscore added)

Furthermore, rather than to limit itself to condemning particularly severe inconsistencies, the CJEU appears to embrace a more comprehensive sliding scale concept of consistency. This follows from *Carmen Media*:

“62. As all the governments which have submitted observations before the Court have observed, it is undisputed that the various types of games of chance can exhibit significant differences, particularly as regards the actual way in which they are organised, the size of the stakes and winnings by which they are characterised, the number of potential players, their presentation, their frequency, their brevity or repetitive character and the reactions which they arouse in players, or, again, by reference to whether, as in the case of games offered in casinos and slot machines in casinos or other establishments, they require the physical presence of the player.

¹⁹⁰ Court, judgment of 15 September 2011 in Case C-347/09 *Dickinger and Ömer*, ECR 2011 I-08185, para. 91; Court, judgment of 30 June 2011 in Case C-212/08 *Zeturf v Premier Ministre*, ECR [2011] 05633, para. 76. In contrast, market definition for competition law purposes requires a considerable degree of demand-side substitutability and also takes supply-side substitutability into account (cf. Commission Notice on the definition of the relevant market for the purposes of Community competition law, OJ 1997 C 372/5, paras. 13 et seq.).

¹⁹¹ *Zeturf*, para. 66.

63. In those circumstances, the fact that some types of games of chance are subject to a public monopoly whilst others are subject to a system of authorisations issued to private operators, cannot, in itself, render devoid of justification, having regard to the legitimate aims which they pursue, measures which, like the public monopoly, appear at first sight to be the most restrictive and the most effective. Such a divergence in legal regimes is not, in itself, capable of affecting the suitability of such a public monopoly for achieving the objective of preventing citizens from being incited to squander money on gambling and of combating addiction to the latter, for which it was established.”¹⁹² (Underscore added)

Here the CJEU confirms that a Member State may operate in parallel a monopoly for certain types of games and a licensing system for private operators for certain other types of games with lower related risks. The CJEU essentially acknowledges that the differences between different types of games are subtle and multi-faceted and may result in different degrees of legislative restriction for different types of games. The sliding scale concept of consistency was further interpreted by the EFTA Court and the CJEU in a way that the actual behaviour of a monopoly operator must be controlled, that individual types of games must be compared in light of features, presentation, reaction of players, and addiction risk, and that individual restrictions must be proportionate, to both the features of each game and the general protection level chosen by the Member State.¹⁹³

In respect of this broadening interpretation, reference should be made to the Ladbrokes ruling of the Dutch Supreme Court of 24 February 2012 where it was stipulated that:

“2.9.4 [...] that the Dutch government applies a restrictive policy in a way that the expansion of gambling is governed and that, whilst the gambling revenues are an important side-effect, they are not the actual justification of the gambling policy.”¹⁹⁴

Despite the initial finding of coherency and consistency in favour of the Dutch gambling policy, whereby the Supreme Court found that the expansion of games of chance is actively controlled and the proceeds arising from games of chance are an important side effect but not actual justification of the policy, the ruling is to be put in perspective as it relates to a factual context dating back to 2003. Since that moment various policy-related and legal developments have taken place, as was also confirmed by the State Secretary in his letter of 4 May 2012, outdating the effect of the ruling.¹⁹⁵ Also the CJEU has rendered various judgments since then, further clarifying the conditions under which the member states are able to pursue their own gambling policies.

More recently, the CJEU assessed particular monopoly conduct in terms of national regulation. In the joined Greek cases *Stanleybet* and *Sportingbet*, the CJEU ruled that Greek gambling monopolist OPAP does not comply with the strict requirements under EU law to justify its monopoly. The ruling confirms in particular that:

“35. The fact that OPAP is a listed public limited company and the finding that the Greek State’s supervision of OPAP is merely superficial, tend to suggest that the requirements [...] might not be satisfied.

¹⁹² *Carmen Media*, paras. 62 and 63.

¹⁹³ EFTA Court, judgment of 14 March 2007 in Case E-1/06 *EFTA Surveillance Authority v. Norway*, paras. 42 et seq.; EFTA Court, judgment of 30 May 2007 in Case E-3/06 *Ladbrokes Ltd. v. Norway*, paras. 49 et seq.

¹⁹⁴ Supreme Court 24 February 2012, LJN BT6689, published in AB 2012, 175. *Ladbrokes Betting & Gaming Ltd/Stichting de Nationale Sporttotalisator*, para 2.9.4.

¹⁹⁵ Letter of State Secretary Teeven to the President of the House of Representatives of the States-General of 4 May 2012 regarding the implementation of the motions put forward at the debate on the legislative proposal regarding the introduction of the Gaming Authority.

36. [...] which grants the exclusive right to run, manage, organise and operate games of chance to a single entity, where, firstly, that legislation **does not genuinely meet the concern to reduce opportunities for gambling and to limit activities** in that domain in a consistent and systematic manner and, secondly, where strict control by the public authorities of the expansion of the sector of games of chance, solely in so far as is necessary to combat criminality linked to those games, is not ensured.”¹⁹⁶

The CJEU confirmed as well that as long as national gambling legislations are found to be incompatible with EU law **“national authorities may not refrain from considering applications [...] for permission to operate in the sector of games of chance, during a transitional period”** until national legislation is compatible with Treaty provisions .¹⁹⁷

When the reform of an existing monopoly to making it compatible with Treaty provisions is not feasible and the re-regulation of the gambling market is considered the better measure for ensuring the desired level of consumer protection **“the introduction in that Member State of an administrative permit scheme [...] must be based on objective, non-discriminatory criteria which are known in advance, in such a way as to circumscribe the exercise of the national authorities’ discretion so that it is not used arbitrarily”**.¹⁹⁸

1.4.2 Detailed and strict assessment of the consistency requirement: evidentiary burden and hypocrisy test

The consistency assessment is characterized by two elements, namely that the Court places the evidentiary burden fully on the Member State and that the Court interprets the consistency assessment as a comprehensive “hypocrisy test”.

1.4.2.1 Evidentiary burden on the Member State

Member States bear the burden of proof for any restrictive measure they impose and must provide an analysis of the appropriateness and proportionality of the restrictive measure.¹⁹⁹

The CJEU clarified both the scope and timeline of the evidentiary burden as follows:

“71. [...] 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.

72. It cannot, however, be inferred from that case-law that a Member State is deprived of the possibility of establishing that an internal restrictive measure satisfies those requirements, solely on the ground that that Member State is not able to produce studies serving as the basis for the adoption of the legislation at issue.”²⁰⁰ (underscore added)

¹⁹⁶ Court, judgment of 24 January 2013 in Joined Cases C-186/11 and C-209/11 *Stanleybet International Ltd and Others and Sportingbet plc v Ypourgos Oikonomias kai Oikonomikon and Ypourgos Politismou*, not yet reported, paras 35 and 36.

¹⁹⁷ *Stanleybet and Sportingbet*, paras 37, 46.

¹⁹⁸ *Stanleybet and Sportingbet*, para 47.

¹⁹⁹ *Markus Stoß*, para. 71; Court, judgment of 13 November 2003 in Case C-42/02 *Lindman* [2003] ECR I-13519, paras. 25 and 26.

²⁰⁰ *Markus Stoß*, paras. 71 and 72.

As to the scope of the evidentiary burden, the CJEU made an important distinction between “evidence” (para. 71) and “studies” (para. 72): while “evidence” is the general term for everything used to demonstrate the truth of an assertion (i.e. within the so-called EU Regulation “necessity test”), “studies” are documents in which certain existing pieces of evidence (e.g. case reports, statistics, interviews) are compiled and processed so as to support or negate certain assertions, themselves constituting pieces of evidence. There are many types of evidence that are not part of studies and constitute “raw evidence” as long as they are not processed into studies. In accordance with this distinction, Member States do not have to be able to produce studies pre-dating the adoption of the legislation at issue.

As to the temporal limitation (para. 72), the CJEU has stipulated that while it is sufficient that the processing of the “raw evidence” into studies takes place after the adoption of the legislation, the general requirement of having sufficient “raw evidence” when the legislation is adopted remains in place. Without such contemporaneous “raw evidence”, justifying a restriction, the adoption of the legislation introducing a restriction would be illegal.

Applying the evidentiary burden to the Dutch monopoly operations, it becomes clear that an overall systematic approach as well as necessity and proportionality studies is a key requirement for the operation of a monopoly. The CJEU has held that “*the supply of games offered by the monopoly must be quantitatively measured and qualitatively planned by reference to the said objective and subject to strict control by the public authorities*”.²⁰¹ Such quantitative and qualitative planning requires a systematic approach and as such necessitates studies. Thus, even though the imposition of a restriction as such may not require contemporaneous preparation of studies, the operation of a monopoly always requires contemporaneous collection of studies.

1.4.2.2 Hypocrisy test

The CJEU interprets the consistency assessment as a comprehensive “hypocrisy test”. One illustrative example can be found in the *Zeturf*²⁰² judgment, in which the CJEU held:

“47. [...] it is for the referring court to determine whether the national authorities genuinely sought, at the material time, to ensure a particularly high level of protection and whether, having regard to the level of protection sought, the establishment of a monopoly could actually be considered necessary.

48. [...]the mere fact that the authorisation and control of a certain number of private operators may prove more burdensome for the national authorities than supervision of a single operator is irrelevant... administrative inconvenience does not constitute a ground that can justify a restriction on a fundamental freedom guaranteed by European Union law.

49. With regard to the level of protection sought by the national authorities in the light of the cited objectives, Zeturf argues, inter alia, that substantial sums of money are regularly laundered by trafficking winning PMU betting slips, which is only possible because the bets are placed with the PMU anonymously and it is therefore impossible to trace the bettor. Zeturf adds, moreover, that that technique of money laundering is widely known and attested to by the activity reports of TRACFIN, the French anti-money laundering unit, which is answerable to the Minister for the Economy, Finance and Employment and to the Minister for the Budget, Public Accounts and the Civil Service.

50. It is for the referring court to examine to what extent these allegations are established and whether any tolerance of such practices is compatible with the pursuit of a high level of protection. [...]

²⁰¹ Markus Stoß, para. 83.

²⁰² *Zeturf*, paras. 47-49, 50 and 57.

57. It should [...] be recalled in that context that national legislation is appropriate for ensuring attainment of the objective pursued only if it genuinely reflects a concern to attain it in a consistent and systematic manner." (Underscore added)

Another illustrative example is the *Dickinger and Ömer*²⁰³ judgment:

"65. It is for the referring court to assess, in the light of the circumstances of the dispute pending before it, whether the commercial policy of the holder of the monopoly may be regarded, both with regard to the scale of advertising undertaken and with regard to the creation of new games, as forming part of a policy of controlled expansion in the sector of games of chance, aiming in fact to channel the propensity to gamble into controlled activities (.

66. In the context of that assessment, it is for the referring court to ascertain in particular whether, first, criminal and fraudulent activities linked to gambling and, second, addiction to gambling could have been a problem in Austria at the material time and whether the expansion of authorised and regulated activities could have solved that problem.

67. Since the objective of protecting consumers from addiction to gambling is in principle difficult to reconcile with a policy of expanding games of chance characterised inter alia by the creation of new games and by the advertising of those games, such a policy cannot be regarded as being consistent unless the scale of unlawful activity is significant and the measures adopted are aimed at channelling consumers' propensity to gamble into activities that are lawful." (Underscore added)

A third illustrative example is the recent *Costa and Cifone*²⁰⁴ judgment:

"58. As regards more specifically the obligation laid down in Article 38(2) and (4) of the Bersani Decree for new licence holders to observe a minimum distance between their establishments and those already in existence, the effect of that measure is to protect the market positions acquired by the operators who are already established to the detriment of new licence holders, who are compelled to open premises in less commercially attractive locations than those occupied by the former. In consequence, such a measure entails discrimination against the operators which were excluded from the 1999 tendering procedure.

59. As regards possible justifications for such unequal treatment, it is settled law that grounds of an economic nature, such as the objective of ensuring continuity, financial stability or a proper return on past investments for operators who obtained licences under the 1999 tendering procedure, cannot be accepted as overriding reasons in the public interest, justifying a restriction of a fundamental freedom guaranteed by the Treaty (.

60. Moreover, the Italian Government cannot, in circumstances such as those of the cases before the referring court, validly rely on its purported objective of ensuring the uniform distribution of betting and gaming outlets on Italian territory in order to prevent consumers who live close to such establishments from being exposed to an excess of supply and to counter the risk that consumers living in less well served areas might opt for clandestine betting or gaming.

61. It is true that those objectives – the reduction of betting and gaming opportunities, and the combating of criminality by making the operators active in the sector subject to control and channelling betting and gaming into the systems thus controlled – are among those recognised by case-law as capable of justifying restrictions on fundamental freedoms in the betting and gaming sector.

²⁰³ *Dickinger*, paras. 65–67.

²⁰⁴ Court, judgment of 16 February 2012 in Joined Cases C-72/10 and C-77/10 *Costa and Cifone*, ECR [2012].

62. However, as the Advocate General states in point 63 of his Opinion and as was held by the Court in paragraph 54 of *Placanica and Others*, as regards the first of those objectives, the betting and gaming sector in Italy has long been marked by a policy of expanding activity with the aim of increasing tax revenue, and no justification can therefore be found in that context in the objectives of limiting the propensity of consumers to gamble or of curtailing the availability of gambling. In so far as the Bersani Decree has significantly increased the number of betting and gaming opportunities still further, as compared with the period under consideration in *Placanica and Others*, that conclusion is all the more valid in relation to the current situation in that sector. [...]” (Underscore added)

The quotes above clearly indicate that the CJEU, no matter whether it assesses a monopoly or a licensing system, does not limit itself to the traditional assessment of whether the chosen restrictive measure is suitable to attain the invoked objective and does not go beyond what is necessary to attain it.

Rather, the CJEU also scrutinizes closely whether the invoked objective as well as the restrictive measures are in line with all other actions shown by the Member State, whereby “actions” are interpreted as (i) not the officially announced behaviour but rather the actual shown behaviour and (ii) not only positive action but – in particular – also failures to act. The CJEU tests whether the national legislation “genuinely reflects a concern” or whether the real reasons for the legislation may be different ones. In other words, the CJEU applies a very comprehensive “hypocrisy test”.²⁰⁵

As illustrated in *Costa and Cifone*, this hypocrisy test is comprehensive not only with regard to the subject matter (i.e. taking the entire gaming sector into account) but also with regard to time (i.e. putting present restrictive measures in perspective with previous policies that continue to have effects in the present). This means that some seemingly small individual restrictions, such as e.g. minimum distances between gaming outlets, may be considered illegal because they come on top of previous restrictions, such as e.g. discrimination in previous licensing, and have to be considered together with them.

1.5 Strict requirements for licensing systems

The detailed and strict consistency assessment is also applicable to Member States having a regulatory system of gaming licences in place. However, such licensing systems do not only have to abide by the consistency requirement but are subject to a number of fundamental EU law principles.

Public licensing authorities need to abide by various requirements in order to comply with the EU Treaties, as illustrated in *Costa and Cifone*. It is particularly noteworthy that in its considerations the CJEU emphasises that legal certainty for individuals and undertakings should be ensured and that the discretion of national authorities should be circumscribed.

The CJEU provided important clarifications in the *Costa and Cifone* judgment with regard to the requirements for gambling licensing systems that follow from the principle of transparency. The CJEU highlighted that:

“56. The award of such licences must therefore be based on objective, non-discriminatory criteria which are known in advance, in such a way as to circumscribe the exercise of the national authorities’ discretion (see, to that effect, *Engelmann*, paragraph 55 and the case-law cited).

²⁰⁵ See opinion of the Advocate-General in *Markus Stoß* of 4 March 2010, ECR [2010] 08069, para. 50.

57. The principle of equal treatment requires moreover that all potential tenderers be afforded equality of opportunity and accordingly implies that all tenderers must be subject to the same conditions. [...] This is especially the case [when] a breach of EU law on the part of the licensing authority concerned has already resulted in unequal treatment for some operators.

74. The principle of legal certainty requires, moreover, that rules of law be clear, precise and predictable as regards their effects, in particular where they may have unfavourable consequences for individuals and undertakings (see, to that effect, Case C-17/03 VEMW and Others [2005] ECR I-4983, paragraph 80 and the case-law cited)." (underscore added)

78. The purpose underlying the principle of transparency... is essentially to... preclude any risk of favouritism or arbitrariness on the part of the licensing authority." (Underscore added)

On the basis of its gambling jurisprudence, the CJEU identified the transparency/equality requirements for the award of gaming licences, which are:

- **Publicity:** Member States must ensure a degree of publicity sufficient to enable the licence to be opened up to competition²⁰⁶;
- **Transparency of award criteria:** the award of the licence must be based on objective, non-discriminatory criteria which are known in advance, in such a way as to circumscribe the exercise of the national authorities' discretion²⁰⁷;
- **Transparency of award procedure:** all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner to preclude any risk of favouritism or arbitrariness²⁰⁸;
- **Equality:** all potential tenderers must be afforded equality of opportunity and accordingly all tenderers must be subject to the same conditions²⁰⁹;
- **Judicial review:** any person affected by a restrictive measure must have an effective judicial remedy available to him²¹⁰.

Even in a situation where a Member State decides to grant the right to operate games to a single entity, it has to apply the transparency rules unless the entity administering the monopoly meets these strict requirements.²¹¹

The CJEU confirms that the EU Treaties apply not only to national gambling legislation but also to the actions of licensing authorities. The CJEU thus limits the discretionary power of Member States strictly to the boundaries set by the Treaties. With this jurisprudence, the CJEU has given its reply to the argument that the supposed ample discretionary power of the Member States stands in the way of an EU framework for gambling.

²⁰⁶ See e.g. Court, judgment of 3 June 2010 in Case 203/08 *Sporting Exchange*, ECR [2010] 04695, para. 41; *Costa and Cifone*, para. 55.

²⁰⁷ See e.g. Court, judgment of 9 September 2010 in Case C-64/08 *Ernst Engelmann*, ECR [2010] 08219, para. 55; *Costa and Cifone*, para. 56.

²⁰⁸ See e.g. *Costa and Cifone*, para. 73.

²⁰⁹ See e.g. *Costa and Cifone*, para. 57.

²¹⁰ See e.g. *Sporting Exchange*, para. 50; *Carmen Media*, para. 87; *Engelmann*, para. 55.

²¹¹ This strict limitation of the exception from the obligation to apply the transparency rules to gaming licences is consistent with the strict limitation of the obligation to tender for public-service contracts, cf. Court, judgment of 13 October 2005 in Case C-458/03 *Parking Brixen v. Gemeinde Brixen, Stadtwerke Brixen AG* [2005] ECR I-8585, para. 62; Court, judgment of 10 September 2009 in Case C-573/07 *Sea Srl v. Comune di Ponte Nossa* [2009] ECR I-8127, paras. 36 et seq.

1.6 Competition law concerns

The online industry shares the view that as part of the modernisation process and through adopting non-discriminatory and consistent license conditions, equal market access conditions must be created with equal opportunities for all online market entrants.

The draft law, however, raises a number of serious competition concerns which are mainly related to the question whether and how equal market access conditions should be established between historical incumbent operators - with an existing (exclusive) license under Dutch law²¹² - and new market entrants that will be eligible for an online license under Dutch law. The draft law mentions the request from the Dutch incumbents to be provided with the ability to offer online gambling before the online gambling legislation enters into force to make up for the “unequal market share” acquired by the online operators over the last few years.²¹³

The industry would like to raise serious concerns with regard to the “oversimplified” manner in which the discussion on equal market access conditions is addressed in the draft law and deems it necessary to warn for the instance where the draft law would reinforce a situation where the historic market positions acquired by the existing operators, through reputation, advertisement campaigns²¹⁴ and customer loyalty, are protected.

The competitive advantage of incumbent operators has been acknowledged in other regulated sectors which have been re-regulated such as the electronic communications sector and the health sector. In these industries the starting point has been that the *incumbent(s)* have a head start compared to new entrants because they have a historic market position which gives them so-called “significant market power” (“SMP”) with the ability to use that dominant position to foreclose the newly re-regulated market from new entrants. On that basis, *ex ante obligations* are imposed on the incumbents in these sectors. These *ex ante obligations* apply on top of the provisions of general competition law in order to prevent competition problems and to enhance competition on the newly re-regulated markets and could include on the wholesale level: access obligations, non-discrimination/transparency obligations, margin squeeze tests, separate accounts and tariff regulation. On retail level these obligations may include non-discriminatory/ transparent conditions and tariffs, tariff regulations and margin squeeze tests on retail level. In addition to the electronic communications sector and the health sector, specific SMP-regulation is being proposed for the postal sector in the Netherlands

While the incumbents may claim that the online operators have been able to build up their market share, and that they should therefore were awarded a commercial benefit by entering the market prematurely, the CJEU has ruled out the possibility for grounds of an economic nature (e.g. the objective of ensuring continuity, financial stability or a proper return on past investments) to be used by licensed operators as overriding reasons in the public interest to justify a restriction of the EU fundamental freedoms.²¹⁵ Thus, the incumbents' request to further restrict the online operators' offer until the draft law enters into force violates primary EU law.

²¹² See notably art 106 FTEU In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109.

²¹³ See Explanatory Memorandum, page 13.

²¹⁴ We note that the Dutch incumbent operators are one of biggest national advertisers with marketing budgets on the levels of other household brands such as McDonalds and Heineken.

²¹⁵ *Costa and Cifone*, para. 53 et al.

Also, practice in other Member States has shown that, upon regulation of the online market, incumbent operators do not necessarily see their market share decreased and often maintain or even strengthen their dominant position.²¹⁶ In a situation where an incumbent enters the online market, it is able to offer a whole range of new products (online casino, online poker, online black jack, online betting, etc.) on top of its broad existing product offer (lotto, scratch card games, joker, keno, bingo, horse and dog race betting, etc.). The competitive advantages from a product perspective as well as (shared) customer databases (e.g. De Lotto and the Toto), enormous marketing campaigns, etc. are undeniable and the incumbents can basically use their monopoly position as a "stepping stone" to market the re-regulated products in a way that is not available to competitors. The question arises whether these practices are in accordance with the competition principles of the EU Treaties. In this context reference can be made by the recent investigation of the Belgian National Competition authority in relation to the expansion of the National Lottery into new product segments such as sports betting²¹⁷.

In fact, figures of incumbent operators in recently regulated markets indicate that their market share has steadily increased after opening. In France for example, the turnover of incumbent operators (casinos, FDJ and PMU) increased with more than 10% from 2010 to 2012. In Denmark, the monopoly Danske Spil saw its business increase 5.13% from 2011 to 62% in 2012. The online gaming business alone grew 60% during this period. In Italy, the revenues of the incumbents Lottomatica and Sisal have increased substantially since the market opening. For example, Lottomatica increased its revenues from 2010 to 2011 with 28.5%.

The strong competitive position of the incumbents, which they have been able to further develop in recent years through extensive commercial campaigns raising brand awareness, is not to be overlooked and nuances the entire discussion on equal market access conditions. The fear that incumbent operators would have a starting disadvantage in comparison to international online providers is unfounded considering the cross-selling potential between their offline and online operations. One cannot ignore the offline database of the incumbents, built over many years through their monopoly activities, which gives them an unrivalled advantage to enhance their position in the online market.

The French Competition Authority earlier advocated that the horizontal integration of the offline and online activities and the cross-exploitation of databases may give rise to an unrivalled competitive advantage and that the use by incumbents of separate customer databases for offline/online clients is to be preferred to ensure the separation of commercial structures in order to prevent any risk of distortion to competition.²¹⁸ Furthermore, the incumbents enjoy a major brand loyalty, due to their historical position and strengthened by immense commercial efforts and overall visibility of their offline activities, as well as social credibility and acceptance. This competitive edge was also recognized by the French Competition Authority, who underlined the ability of incumbent operators to generate market distortions through the use of their historic brands, notably in markets recently opened to competition, and even recommended that incumbent operators should stop using their offline brands to promote online operations.²¹⁹ The use by incumbents of their land-based networks

²¹⁶ Denmark: Danske Spil (including its subsidiaries) is by far the largest player with a dominant market share. Danske Spil has a market share of approximately 60% despite being "new" player within the re-regulated area, available at <http://www.skat.dk/getFile.aspx?id=104843>

²¹⁷ De Standaard, 25 juli 2013 "Huiszoekingen bij Loterij na klachten over 'Scoore', available at http://www.standaard.be/cnt/dmf20130725_00670156.

²¹⁸ Opinion of the French Competition Authority of 14 June 2010 on the cross-exploitation of databases, available at <http://www.autoritedelaconurrence.fr/pdf/avis/10a13.pdf>.

²¹⁹ Opinion of the French Competition Authority of 20 January 2011 on the online gaming sector, paras. 191-193, available at http://www.autoritedelaconurrence.fr/user/standard.php?id_rub=388&id_article=1536.

for promotional activities in relation to their online operations (“cross-subsidization”) is one other element likely to grant them a competitive advantage over online operators.²²⁰

In any case, preferential conditions for the national incumbents in order to develop their online activities subject to competition seem to lead to a significant distortion of competition at the expense of alternative operators that do not have such opportunity and amount to an abuse of their dominant position, in violation of the EU Treaty. In order to avoid a competitive distortion to the detriment of private operators, the Dutch legislator is called to avoid any market access modalities for national incumbents that are not in line with EU competition and internal market rules. One can neither exclude that any such conditions would equally constitute state aid in the meaning of article 107 TFEU.

Another essential nuance the draft law fails to make is the “challenging” position in which online operators have to operate: despite being licensed in other EU jurisdictions, the operators are currently actively prevented from applying for Dutch licences²²¹ and thus entering the Dutch market under the same conditions as the Dutch incumbents. We note that while some of the incumbent operators are state enterprises, whereas others are commercial civil law entities. Following the right to provide services under Article 56 TFEU, they develop their activities alongside the existing incumbents, but are averted from doing so under a Dutch licence. The fact that they are denied regulated market access goes clearly against fundamental EU principles and CJEU jurisprudence.²²²

²²⁰ Opinion of the French Competition Authority of 20 January 2011 on the online gaming sector, paras. 199-200, available at http://www.autoritedelaconurrence.fr/user/standard.php?id_rub=388&id_article=1536.

²²¹ See supra on the allocation of national gaming licenses and the principles established by national and European case law, and/or its interaction with article 106 TFEU

²²² *Placanica*, paras. 62-63; *Costa and Cifone*, paras. 58-62.

