



**RESPONSE OF STICHTING ONLINE GAMING ("STIOG") TO THE GREEN PAPER ON
ON-LINE GAMBLING IN THE INTERNAL MARKET**

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Introduction

Stichting Online Gaming Nederland (hereinafter "STIOG") represents not only the largest listed European remote gaming operators in the Netherlands but also the biggest national media groups. Stakeholders include Oranje Casino, Bwin.Party, Unibet, Betfair and RTL Media. STIOG positively contributes to the realisation of the regulation of online games of chance in the Netherlands through national and international cooperation, and bringing its extensive expertise and know-how in this field to relevant actors at the national level.

Nevertheless STIOG welcomes the opportunity to respond to the European Commission's Green Paper on on-line gambling in the Internal Market. It allows us to provide input to the debate at the European level thus ensuring that the perspective of private operators vis-à-vis the specific situation prevailing in the Netherlands is heard. To this end we have not responded to all questions put forward and seek to avoid duplicating the information advanced by our European partners such as the European Gaming and Betting Association (EGBA) and the Remote Gaming Association (RGA).

State of Play in the Netherlands

The regulation of gambling in the Netherlands is currently undergoing across the board reform following the policy note of the current State Secretary for Safety and Justice, Fred Teeven.¹ A key element of this reform is the introduction of a regulatory regime for online gambling. Strictly speaking online gambling is prohibited in the Netherlands on the basis that no licences are available for it under primary legislation, namely the Dutch Betting and Gambling Act 1964 (*Wet op de Kansspelen*). Although a number of the incumbent operators are permitted to offer their services via the Internet there are no specific regulatory conditions to be found in primary nor secondary legislation. Furthermore there is a general lack of (recent) research to provide an evidence-based approach for decision-making, which is in danger of running the risk of failing to appropriately respond to the government's objectives. In light of the lack of a regulatory regime and regrettably any detailed legislative proposals at the time of drafting this submission we lack detailed input to answer many of the questions advanced in the Green Paper.

Key goals of the reform process, as set out on 19 March 2011, include:

- Allocating more revenues from lotteries for the sport sector
- Generating €10m on an annual basis for the (auctioning of) licences for (internet) gambling/lotteries
- Regulation of the remote gaming sector
 - Poker, bingo, casino games and betting
 - Liberalise the offline market
- Enabling consumers to access a suitable and attractive range of services
- Ensuring 'horizontal consistency' across all times of gambling
- Shift away from monopoly based supply; create competition
- Awarding licences in a consistent, transparent and non-discriminatory manner
- Reflect consumer demand with regulated supply 1.

¹ 24 557, nr. 124, Brief van de Staatssecretaris van Veiligheid en Justitie, 19 maart 2011.

Key dates:

- End of 2011: Introduction of bill for the regulation of remote gambling
- January 2012: Introduction of the independent Gaming Authority; *Kansspelautoriteit*
- Before end of 2012: Introduction of licences for online gambling
- 2015: Licences for other forms of gambling (i.e. casino and lotteries)

Response to Questions

Q1: Are you aware of any available data or studies on the EU on-line gambling market that would assist policy-making at EU and national level? If yes, do the data or study include licensed non-EU operators in the EU market?

- *Aard en Omvang van Illegale Kansspelen in Nederland*
Amsterdam, July 2009, Regioplan, available at <http://wodc.nl/onderzoeksdatabase/aard-en-omvang-illegale-kansspelen-in-nederland-onderzoeksfase.aspx?cp=44&cs=6802>
This report provides an overview of illegal gambling in the Netherlands, both online and offline.
- *Legalisatie van kansspelen via internet. Eindrapport van de Adviescommissie Kansspelen via Internet*, August 2010, available at <http://www.rijksoverheid.nl/documenten-en-publicaties/rapporten/2010/08/23/rapport-kiv.html>
This report provides an overview of the online patterns of consumption of Dutch consumers of online gambling services. No distinction has been made between operators licensed in or beyond the EU. Ultimately the report finds that poker is the most popular form of online gambling and recommends that this be regulated at the national level.
- *Aard en omvang van kansspelverslaving in Nederland in 2010*
Schrijvers, C., Risselada, A. & Meerkerk, G.-J., IVO Addiction Research Institute, October 2010, available at <http://www.ivo.nl/?id=754&PHPSESSID=esdlsn0hoofmsklpsv2v94cs13>
This report considers the nature and extent of gambling addiction in the Netherlands, the forms of gambling that are the cause thereof, and the psychological and demographic factors associated with gambling addiction. It concludes that there are approximately 32.000 problem gamblers in the Netherlands for all forms of gambling, online and offline combined.
- *An Independent Assessment of Various Taxation/Licensing Models for Regulating Remote Gambling in the Netherlands*
H2 Capital Gaming, 18 February 2011, available at http://www.stiog.nl/wp-content/uploads/2011/08/H2_STIOG1.pdf.
This report provides an overview of different tax rates and IT requirements with a view to establishing which combination has the greatest likelihood of raising the most revenue for the Dutch Government and securing the achievement of current regulatory objectives.

Q2: Are you aware of any available data or studies relating to the nature and size of the black market for on-line gambling services? (Unlicensed operators)

We take issue with the notions of a black market and unlicensed operators. All STIOG operators are licensed by reputable jurisdictions, such as Gibraltar and Malta. Whilst undoubtedly unregulated and illegal operations exist, also at a domestic level, to tarnish regulated operators in this manner fails to recognise the regulatory activities undertaken in other jurisdictions. Therefore we refer you to the responses of EGBA and the RGA in this regard.

From the position of Dutch law, which does not offer the possibility for online gambling, there is considerable demand for online services. In 2010 the report *Legalisatie van kansspelen via Internet. Eindrapport van de Adviescommissie Kansspelen via Internet* found that 565.000 Dutch residents played online and the report provided a breakdown of the seven most popular websites, which account for nearly half of all online participation; these seven are all regulated in the European Union.

Q3: What, if any, is your experience of EU-based on-line gambling operators licensed in one or more Member States and providing and promoting their services in other EU Member States? What are your views on their impact on the corresponding markets and their consumers?

Q4: What, if any, is your experience of licensed non-EU on-line gambling operators providing and promoting their services in EU Member States? What are your views on their impact on the EU market and on consumers?

EU-based and non-EU based operators with Dutch clients provide services for which considerable domestic demand exists and yet the current incumbent operators are unable, due to legal restrictions, to supply. The report *Aard en omvang van illegal kansspelen in Nederland* found that 565.000 Dutch residents participate in services, which are deemed illegal by Dutch law, clearly showing that the national prohibition on online gambling does not correspond to consumer demand. Given the cross-border nature of the Internet consumers can readily access services of providers established and regulated in other jurisdictions and are not limited to those services of the national monopolists in a manner, which they would be in the case of offline services. Undoubtedly the ability of EU and non-EU based operators rests in part upon widely available and affordable Internet access. As such the internet has placed the Dutch domestic regulatory regime for gambling under considerable pressure, particularly given the difficulties Member States experience in blocking the flow of internet-based commerce (via IP blocking and financial transaction blocking, see below in relation to Q12 and Q50).

Operators established and regulated in EU jurisdictions have sought to rely upon the free movement of services under Article 56 TFEU to supply their cross-border gambling services into the Netherlands. Member States have been granted an abnormally generous margin of discretion within which they can restrict the cross-border provision of gambling services, and with the rise of national licensing regimes attention will undoubtedly focus upon access to such regimes, the interface between multiple regimes and the cooperation between national regulatory authorities. From within the Dutch legal system the preliminary reference in *Betfair* has resulted in national authorities having very little room to manoeuvre in terms of not applying the duty of transparency to the award or renewal of a licence for the supply of gambling services, with the duty applying regardless of the form of the authorisation. Access to and the regulation of such regimes are likely to form the new battlefield.

Whilst the case law of the CJEU has concentrated upon the ability of Member States to restrict the cross-border movement of gambling services and service providers, the right to receive services should not be neglected. The free movement of services case law pursuant to Article 56 TFEU has been understood to include this aspect of the relationship between provider and consumer; and its applicability to gambling services was recalled by the CJEU in *Gambelli* (C-243/01, at para. 55).

Q5: If any, which are the legal and/or practical problems that arise, in your view, from the jurisprudence of national courts and the CJEU in the field of online gambling? In particular, are there problems of legal certainty on your national and/or the EU market for such services?

From a pan-European perspective we refer you to the submissions of EGBA and RGA. From a national perspective we are facing the re-regulation of the gambling sector, which will include the regulation of online gambling. At present the contours of this have not yet been made known by the Ministry of Justice and Safety thus we are not in a position to comment on the licence award procedures and conditions. Following the *Betfair* decision there is greater certainty that licences will be awarded in accordance with the duty of transparency; the finding by the Council of State on 23 March 2011 that the incumbent operator was not subject to strict control sends a strong signal that private EU-based operators should have a fair chance at entering the national market in practice. Furthermore we are awaiting the outcome of the Supreme Court in light of the CJEU's decision in *Ladbrokes* (C-258/08), which illustrates the challenges posed by the Netherlands undertaking conflicting objectives (consumer protection and combatting criminality through expanding the supply of services available).

Given the significant margin of discretion enjoyed by Member States and the hesitation of the CJEU to declare a matter incompatible with the internal market freedoms in combination with the confusing nature of this case law we do not see an immediate end to the prevailing legal uncertainty at the European level. Furthermore we can only regret the failure of the European Commission not to have taken a more active stance in recent years with regards to the infringement proceedings it had launched against the Netherlands concerning sports-betting services.

Q7: How does the definition of on-line gambling services above differ from definitions at national level?

At present online gambling is not defined, it is prohibited because no licences are available. However several of the incumbent operators, but especially for sports betting and horserace betting, are allowed to offer their services online. This is deemed to be 'e-commerce', whereby the operators offer online the services which they are permitted to offer offline with the Internet being perceived as merely a distribution channel. We consider this to be an unfounded distinction. Furthermore the regulation of these online activities is not transparently regulated but relies upon Ministerial approval of the operators' rules of participation. For further information see *Legalisatie van kansspelen via internet. Eindrapport van de Adviescommissie Kansspelen via Internet*.

Q12: Are there specific national regulations pertaining to payment systems for online gambling services? How do you assess them?

There are no such regulations at present reflecting the lack of regulation in this area. However the current State Secretary for Justice and Safety is planning to introduce a 'blacklist' for the purposes of financial transaction blocking. Relying upon the support of the Dutch Banking Association (*Nederlandse Vereniging van Banken*) the State Secretary hopes that financial service and payment service providers will not process transactions for operators named on the list. However it is widely considered that the current Dutch Betting and Gambling Act 1964 (*Wet op de Kansspelen*) does not offer a legal basis for this.

Q14: What are the existing national rules and practices relating to customer verification, their application to on-line gambling services and their consistency with data protection rules? How do you assess them? Are there specific problems associated with customer verification in a cross-border context?

Reflecting the current lack of regulation of this sector there are no regulations on this point. However, as pointed to earlier, existing operators are permitted to offer their services online under the guise of 'e-commerce'. Some operators, such as De Lotto for example, are explicitly permitted by their non-transparently awarded licence to offer internet-based services, whilst others such as the charity lottery sector (*Nationale Goede Doelen Loterij*) are permitted to do because their rules of participation, as approved by the Ministry of Justice and Safety, refer to services provided via the internet. Yet there is no gambling specific legislation, which sets forth conditions as to customer verification. This, along with other matters, is dealt with on an ad hoc basis, per approval of each set of rules of participation. As an example, the only reference to the process of customer verification in the rules of participation for De Lotto (*Deelnemersreglement Stichting de Nationale Sporttotalistor*) as approved in 2010 merely state that "the participant is responsible for correctly applying for e-commerce based participation. De Lotto has the right to check the accuracy of the details provided by the participant".

The robustness of such a discretion based system of control can readily be called into question and falls far short of the checks required by private operators in other EU jurisdictions, for which we recommend that you refer to the responses of EGBA and RGA. No equivalent document setting out similar rules can be found on the website of the horserace totalisator.²

Q17: Do you have evidence (e.g. studies, statistical data) on the scale of problem gambling at national or EU level?

The study *Aard en omvang van kansspelsverslaving in Nederland in 2010* estimates that there are 32.000 problem gamblers in the Netherlands. This indicates a reduction in the scale of problem gambling in the Netherlands, which the report discusses in detail, but in summary has reduced from 70.000 in 1996 to 40.000 'gambling addicts' in 2006, and now further again whilst participation in regulated online services has become a widespread phenomenon (see details in relation to the report *Legalisatie van kansspelen via internet. Eindrapport van de Adviescommissie Kansspelen via Internet*).

Q20: What is done at national level to prevent problem gambling? (E.g. to ensure early detection)?

Given the lack of regulation there are no specific measures to prevent problem gambling amongst online players.

Q21: Is treatment for gambling addiction available at national level? If so, to what extent do on-line gambling operators contribute to the funding of such preventive actions and treatment?

There are various organisations, which provide treatment for those suffering from problem gambling, but no specific organisation dedicated to the online sector. Incumbent operators, who provide services via the 'e-commerce' route, do not provide any funding for the treatment of problem gambling.

Q22: What is the required level of due diligence in national regulation in this field? (E.g. recording on-line players' behaviour to determine a probable pathological gambler?).

Given the lack of a regulatory regime for online gambling there are no due diligence requirements.

² www.runnerz.nl, last checked on 30 August 2011.

Q23: Are the age limits for having access to on-line gambling services in your or any other Member State in your view adequate to attain the objective sought?

If the objective of age limits is simply to exclude minors from participating in online gambling services, then yes, they are adequate in theory but will depend upon the effectiveness of their implementation. As far as the limited experience of the Netherlands is concerned, see the answer to Q14.

Q24: Are on-line age controls imposed and how do these compare to off-line 'face-to face' identification?

Please see the answer to Q14 as to how this works with for the 'e-commerce' route.

Q25: How are commercial communications for gambling services regulated to protect minors at national or EU level? (E.g. limits on promotional games that are designed as on-line casino games, sports sponsorship, merchandising (e.g. replica jerseys, computer games etc.) and use of social on-line networks or video sharing for marketing purposes.

Q26: Which national regulatory provisions on licence conditions and commercial communications for on-line gambling services account for these risks and seek to protect vulnerable consumers? How do you assess them?

For these questions we refer you to the response of the Dutch Government *Kabinetsreactie Groenboek Online gokken op de interne markt* of 8 June 2011.

Q27: Are you aware of studies and/or statistical data relating to fraud and on-line gambling?

No research directed towards fraud and online gambling has been carried out in the Netherlands or specifically regarding the Netherlands. In this regard we refer you to the studies to which the EGBA and the European Sports Security Association (ESSA) refer in their submissions.

Q28: Are there rules regarding the control, standardisation and certification of gambling equipment, random generators or other software in your Member State?

For this question we refer you to the response of the Dutch Government *Kabinetsreactie Groenboek Online gokken op de interne markt*. There are no specific rules regarding online services, including 'e-commerce' in the Netherlands. However, in light of the upcoming regulation of online gambling we strongly favour the introduction of standards to reflect those found in the CEN *Responsible Remote Gambling Measures*.³

Q29: What, in your opinion, are the best practices to prevent various types of fraud (by operators against players, players against operators and players against players) and to assist complaint procedures?

In this regard we refer you to the comprehensive answer provided by the EGBA and RGA.

Q30: As regards sports betting and outcome fixing - what national regulations are imposed on on-line gambling operators and persons involved in sport events/games to address these issues, in particular to prevent 'conflicts of interest'? Are you aware of any available data or studies relating to the magnitude of this problem?

Further to the detailed responses provided by the EGBA, RGA and particularly the ESSA⁴ to our knowledge no study has ever been carried out to establish whether any of the activities referred to occur in the Netherlands. Additionally, there are no specific regulatory measures addressing these concerns as far as the sports betting and horserace betting monopolies and their online activities are concerned.

Q38: Are there other gambling revenue channelling schemes for the public interest activities at national or EU level?

Q39: Is there a specific mechanism, such as a fund, for redistributing revenue from public and commercial on-line gambling services to the benefit of society?

As an initial statement, given that the current regulatory regime does not explicitly regulate online gambling there are no measures in place to distribute revenues generated by the 'e-commerce' route.

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³ European Committee for Standardisation, CWA 16259: 2011 – Responsible Remote Gambling Measures available at <http://www.cen.eu/cen/Sectors/TechnicalCommitteesWorkshops/Workshops/Pages/WS58eGambling.aspx>

⁴ For more information see www.eu-ssa.org.

Revenue generated by such play is distributed in the manner explained in the response of the Dutch Government *Kabinetsreactie Groenboek Online gokken op de interne markt*. What is not apparent from this answer however is the lack of transparency concerning the distribution of revenues generated the charity lotteries, the *Nationale Goede Doelen Loterijen*. Whilst the revenue of each of the lotteries is earmarked for specific good causes, the actual distribution of money amongst applicant beneficiaries is not specified in national law and left to the discretion of the operating undertaking. This process lacks transparency and questions in the lower house of parliament, the *Tweede Kamer*, have been asked regarding the accountability of the system. However the distribution of funds and associated mechanisms should be distinct from the operator offering the revenue generating services to prevent a concentration and potential conflict of interests.

Q42: Do all sports disciplines benefit from on-line gambling exploitation rights in a similar manner to horseracing and, if so, are those rights exploited?

Q43: Do on-line gambling exploitation rights that are exclusively dedicated to ensuring integrity exist?

No such exploitation rights exist in the Netherlands regarding sports betting, however we share the scepticism found with the submissions of the EGBA, RGA and ESSA as to the effectiveness of such a right as a means to uphold the integrity of sporting competitions.

Q44: Is there evidence to suggest that the cross-border "free-riding" risk noted above for on-line gambling services is reducing revenues to national public interest activities that depend on channelling of gambling revenues?

There is no evidence that online gambling services have reduced the revenues generated by the current domestic operators, and indeed, even in the presence of a sizeable proportion of the Dutch gambling population consuming services offered by operators licensed outside of the Netherlands contributions to good causes have increased (the Annual Reports of the *College van Toezicht op de Kansspelen* show that the following amounts were generated for good causes by the *Nationale Goede Doelen Loterij*; €305,3m in 2006, €319.4m in 2007, €350.2m in 2008, €364.1m in 2009 and €375.9m in 2010).⁵ Upon the regulation of the online gambling sector in the Netherlands, conditional upon the Government setting an appropriate rate of taxation, the national licensing regime will permit the capturing of revenues, which are currently moving cross-border.

⁵ The Annual Reports are available at the following webpage of the *College van Toezicht op de Kansspelen*; <http://www.toezichtkansspelen.nl/verslagen.html>.

Following the aforementioned study by H2 Capital Gaming the most favourable rate of taxation will be a 5% gross win tax, favourable in terms of capturing most domestic demand and enabling operators to generate the highest amount of revenues.

Q46: Is there a regulatory body in your Member State, what is its status, what are its competences and its scope of action across the on-line gambling services as defined in this Green Paper?

At present regulatory powers are predominantly centred within the Ministry of Justice and Safety, in conjunction with the Ministry of Finance. This is supported by the Gaming Control Board (*College van toezicht op de kansspelen*), which provides advice to the Ministry of Justice, as detailed in the response the Dutch Government *Kabinetsreactie Groenboek Online gokken op de interne markt*. However it is widely regarded as a toothless tiger.

An independent regulatory body for the sector, the *Kansspelautoriteit*, is due to become operative in 2012 and will be responsible for the regulation of the entire sector, including the online gambling sector once primary legislation enters into force. Is it worth going into detail as to what its powers may be, bearing in mind that some detail is provided within the *Kabinetsreactie*.

Q49: Are you aware of such enhanced cooperation, educational programmes or early warning systems that are aimed at strengthening integrity in sport and/or increase awareness among other stakeholders?

To our knowledge, no measures comparable to those referred to in the response of ESSA have been introduced in the Netherlands.

Q50: Are any of the methods mentioned above, or any other technical means, applied at national level to limit access to on-line gambling services or to restrict payment services? Are you aware of any cross-border initiative(s) aimed at enforcing such methods? How do you assess their effectiveness in the field of online gambling?

Q51: What are your views on the relative merits of the methods mentioned above as well as any other technical means to limit access to gambling services or payment services?

Please refer to the answer provided to Q12 for views on the use of financial transaction blocking.

The Dutch Government has referred to IP address blocking as a means to exclude operators licensed in other jurisdictions from accessing the Dutch residents.

This is also found within the *Kabinetsreactie Groenboek Online gokken op de interne markt*. However, we strongly question both the legality and effectiveness of such measures. As such we wholeheartedly endorse the response of the European Digital Rights association in which it critically assesses the usefulness of blocking internet traffic; in terms of the ability of the state to prevent residents from accessing services hosted elsewhere but equally regarding the very real likelihood that unrelated websites are also blocked.

Moreover, should the Netherlands move towards such blocking measures then this would appear to be a direct contradiction of recent legislation which enshrines the principle of net neutrality into national law. Net neutrality entails that Internet service providers cannot block access to, or charge higher prices for, the use of applications and internet-based services, which may take up more bandwidth. With such a national digital policy stance in mind it would be hypocritical of the Netherlands to require internet service providers to block access to services which are legally provided in the jurisdiction of regulation, particularly when lacking a domestic regulatory regime which reflects consumer demand (as illustrated in response to Q4).