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Brussels, 26 March 2015

Subject: Response request concerning Ministry of Security and Justice's letter of 29 January 2015 on draft Amendment of the Dutch Betting and Gaming Act regarding the gaming casino regime – REF: 610366.

Your Excellency,

On behalf of the European Casino Association (ECA) I would like to kindly thank you for your letter of 29 January 2015 with regard to the draft Amendment of the Dutch Betting and Gaming Act concerning the casino regime, and for the opportunity to respond thereto.

Founded in the early 1990s as the European Casino Forum, the ECA has progressively grown over the years and today includes 24 members from the majority of the EU's Member States, Switzerland and Serbia. To this end, the ECA represents the interests of approximately 900 casinos and over 70,000 employees across Europe. Yet, the ECA is not only a key employer in the various European geographies.

The association represents a €8bn industry and therefore is a key contributor to national tax revenues, and furthermore signifies an important part of various sectors, such as tourism. Indeed, the business has evolved from the simple provision of traditional casino table games to a far broader casino concept, which includes table games (including poker), slot machines, food & beverage, entertainment, hotels and much more.

The distribution channels for our services have also changed over time. From a single land-based source, distribution in some countries has now been extended to the Internet as well as to other multiple technology-based channels.

Notwithstanding these developments, the ECA membership remains committed to the core values associated with the ECA's identity: representing the interests of Europe's licensed, land-based casino industry and its portfolio of offline and online gambling and other recreation and leisure services. To this end, the ECA Code of Conduct serves as a constant reminder of the key requirements set out by the ECA, which its members are required to uphold as a condition of membership. The Code governs the conduct of all ECA members and seeks to ensure that they champion the ECA's

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fundamental values of integrity, professionalism, social responsibility and ambition by observing the principles explained in the ECA Code of Conduct. As a matter of fact, a key pillar for any ECA member remains responsible gambling policy and therefore the promotion of safe gambling.

Following this, the ECA welcomes the Netherlands' initiatives to introduce reforms in the gambling sector. We would like to address four specific aspects with regard to the proposals in question:

- (1) The taxation imbalance between land-based and online casino services;
- (2) The ban of online services in land-based casinos;
- (3) Eligibility for a licence;
- (4) Unfair competition and requirements for a licence.

I. TAXATION IMBALANCE

Although, not directly addressed in the proposals regarding casinos, with a view of reflecting our letter from 12 March, 2013 to the former State Secretary of Finance, his Excellency, Mr. Drs. F.H.H. Weekers, we would like to re-iterate our concern regarding the taxation imbalance provided by the approach of a 20% of GGR for online gambling activities, compared to the rate of 29% applicable to land-based (casino) gambling.

Based on several premises and confirmed by jurisprudence, there is no actual *market* difference between online and terrestrial services. Online is only an alternative distribution channel of services which are also provided by land-based institutions. As indicated in the letter from 2013, this can be seen in the following:

- (1) The Court of Justice of the EU ("ECJ") has confirmed that online gambling is only a new type of distribution of games and not a specific type of game in itself. In the Zeturf case, for example, it was stated that *"the internet constitutes a simple channel through which games of chance may be offered"*¹
- (2) In the Antigua-US WTO Internet Gambling case (WT/DS285)² the WTO Appellate Body as well as the WTO Panel decided that internet gambling was legally no different than land-based gambling and that the Internet was nothing more than another distribution method. They have been considered as "like" services whereby the online can be supplied on a cross-border basis.
- (3) The trends in volume of activity between Internet and land-based, and the correlation between these – i.e. the decrease in land-based and the increase in internet volume – demonstrate that both channels belong to the same market.

In the Explanatory Memorandum concerning the Betting and Gaming Act regarding remote games of chance, a specific taxation regime for online services is based on the notion that a 20% betting and gaming tax of GGR *"leads to a reasonable betting and gaming tax revenue, whereas also a*

¹ ECJ, Zeturf, 30 June 2011, C-212/08, § 75.

² "Measures Affecting the Cross-Border Supply of Gambling and Betting Services"

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channelling is achieved to essentially realize the government's objectives for remote games of chance".

The ECA fully supports the need to ensure that games of chance, no matter what the form of distribution, are provided through legal channels, also with a scope to drive illegal operators to become insufficiently competitive so as not to be appealing to the domestic consumer. Yet, ensuring a legal gambling environment does not only pertain to the offering of a sufficient and competitive offer through online distribution channels, but equally through offline.

To this end, it is equally important to take into account the unfair competition which is already existent to traditional channels of gaming and the unfair competition which would be created based on the tax discrepancies introduced by the proposals:

- (1) There are a plethora of gambling operators which are providing games of chance without authorisation within several Member States, including the Netherlands, mostly based on the incorrect premises that the subsidiarity principle does not apply to gambling services in the EU and that the principle of mutual recognition of licences apply to the sector. Such operators that have not been authorised by the Member State ("unauthorised operators") in the Dutch market have had the opportunity to build a database of Dutch consumers, gain market understanding as well as building its brand, which law abiding prospective licensees have not. Consequently, the former will be better positioned and equipped to bid for a licence in the Netherlands than those that have respected the Dutch regulation. Moreover, unauthorised operators have not been subject to the same fiscal obligations as legal operators will once they are granted a licence, and thus they have been able to structure their businesses for future services in the Dutch market at a lower cost than prospective new licensees will be able to. This clearly affords the prior unauthorised operators a competitive advantage.
- (2) In general, land-based casinos face higher operational costs than their online counterparts. Not only are the start-up costs necessary for land-based casinos much more substantial, but so are the operational costs. In the majority of the land-based casinos, the level of employment is high. As a consequence, the real costs incurred by this high level of employment in the land-based casinos are obviously substantially higher than those of the online gambling operators. It should be noted that land-based casinos' contributions to society and the economy, through several forms of taxation, employment, etc., generally outweigh those of online services.

Taking into account the need to ensure a legal offer of gambling services, no matter what channel of distribution is used, a levelled playing field is required. This holds especially true as at the core it is the same games of chance that will be provided terrestrially as well as online. Land-based casinos play an equally important role when it comes to consumer protection and gambling addiction measures, fair gaming standards and prevention of match fixing, combating fraud and criminality.

As stipulated by the Explanatory Memorandum regarding the Amendments to the casino regime:

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“The proposal is to set the maximum number of licences to be granted, and...this limited expansion (compared to the current fourteen gaming casinos) will keep the supply controllable... As a result of the entry of newcomers, the existing demand for casino games will be met by several parties in a suitable and attractive way. A suitable and attractive legal supply will keep consumers away from illegal and uncontrolled supply and is therefore necessary for the purpose of channelling the demand for games of chance.”

It is the ECA’s position that an attractive legal supply will depend not only on the amount of establishments and channels available but also on the incentive of consumers to use one platform over another. An unlevelled playing field where online operators benefit taxation-wise will provide incentives for consumers to choose online over terrestrial services, especially as the former would have a more favourable economic situation, due to a higher marketing budget and pay-outs for players for example.

II. THE BAN OF ONLINE SERVICES IN TERRESTRIAL CASINOS

The Explanatory Memorandum regarding the proposals pertaining to the casino regime with specific focus on Art. 27h (Paragraph 4) states that:

“...a licensee may not offer any remote games of chance to visitors of his gaming casino in that gaming casino, even if he possesses a licence to offer remote games of chance. This delineation can prevent the various games of chance submarkets, within which different provisions apply to different parts, becoming caught up in each other's wake.”

In light of the Dutch government’s intention to ban online services within brick-and-mortar premises of the same operator, the ECA sees no additional risk in allowing remote gaming in a casino, especially if the services derive from the same provider / operator. A consumer might just as well leave the premises to use the gambling services elsewhere. With portable devices such as smart phones allowing for easy access to remote services, an obligation for casinos to monitor and ensure this would be very hard, if not impossible, to fulfil.

Furthermore, disallowing the host casino’s games of chance to be accessed on the physical premises, whereas such services from other operators would be accessible, provides for unfair competition.

Also, joining up land-based with online products is a key strategy for increased competitiveness for retail and leisure businesses. A consumer-focused streamlining and integration of product channels requires the necessary innovation to this end. Innovation for the gambling industry, and equally for any business, is key to competitiveness. Therefore, the hindrance of innovation can translate into losses in jobs and equally in tax revenues.

On another point, the Dutch government intends to allow licensees to provide additional services to casino games. The Explanatory Memorandum states that:

“Licensees - more than is currently the case for Holland Casino - will be offered room to engage in 'other' activities (than the main activity: offering the opportunity to participate in games of chance played in a group and on gaming machines). The basic principle is that licensees may, in addition to

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casino games, organise other types of business activities as long as these activities do not prevent a proper and reliable operation of casino games.”

The ECA sees that the offering of online games would not prevent the proper and reliable operation of the physical games. Indeed, it would benefit consumers who would be able to make direct comparisons of the gambling service channels. Allowing casinos to provide their own internet services on the premises would allow the operator to promote their own offers, and equally provide the potential users with the necessary information and explanations, no matter whether it is commercial or consumer protection related. Finally, a consumer who would like to use the online services, but would not be allowed to, would therefore not benefit from the alternative integrated entertainment / HORECA services (or any business activity mentioned above) provided on the casino premises.

To this end it is ECA's position that a regulation at the very least must be practical in the sense that it does not place a costly and complex burden on the subject of the legislation that cannot easily be judged or understood. Also, for the purpose of fair competition and an innovative industry, we therefore hope that the additional evidence provided allows for casino operators in the future to offer their online games on their own premises.

III. ELIGIBILITY

The ECA is a strong proponent of the principle of subsidiarity. The subsidiarity principle has been established and sufficiently detailed with respect to its range and demands, not least in the decisions of the ECJ and the European Commission. Consequently, it is safe to say that a Member State is free to lay down its own regulations in the gambling field as long as the regulation is fair and non-discriminatory and its objectives are in accordance with the accepted principles that have been established by the ECJ.

Bearing that in mind, ECA wishes to underline that the system becomes strained when operators can obtain a licence and provide remote games of chance in one Member State, that has decided on a licence system, while simultaneously providing remote games to another Member State without authorisation and contrary to the regulation in that second Member State. In ECA's mind it would be beneficial for the system as a whole, and thus for all Member States, if the legislation and regulatory framework of Member States not only respected the principle of subsidiarity and right of self-determination but also supported and empowered these principles.

To this end, the ECA advocates that each Member State's legislation and provisions on eligibility for attaining a licence should have due regard to the suitability of a company/operator based on its current and historic operational activities and its adherence to regulatory and legislative matters when deciding whether it is a 'fit and proper' company/operator eligible for a licence within a Member State. The ECA also suggests that these principles should be applied as part of the scrutiny of an operator's suitability whereby the operator conducts its business outside of Member States' jurisdiction. To make regulation of this nature effective, the same provision should apply to suppliers

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of gaming equipment – i.e. a supplier cannot be licensed to supply its equipment in one Member State if it simultaneously provides these to an operator for use in another Member State or other jurisdiction where the operator is not authorised. It should be noted that the Gambling Commission in the UK took steps in this direction during its last revision of the UK Gambling Act. It is the ECA's position that the effect and cleansing of the illegal market within the EU will be stronger when and if more Member States join this effort and adopt relevant requirements.

The ECA believes that it is detrimental for the EU and its citizens, wherever they reside, if companies can circumvent the general EU principles by cherry picking where and how they will establish their business. In effect, a Member State's ambitions regarding important issues such as consumer protection and gambling addiction measures, fair gaming standards and prevention of match fixing, combating fraud and criminality as well as privacy and personal data protection can become completely undermined if the Member State cannot uphold its regulations towards operators that provide their services from other Member States.

In conclusion it is ECA's opinion that if Member States fail to show loyalty to the regulation of other Member States' regulatory systems there is no incentive, or indeed need, for international businesses to do so. Furthermore, if rules and regulations in accordance with the aforesaid are to be implemented with respect to online casinos services, equal rules should be implemented with respect to terrestrial casinos so as to comply with the principles of non-discrimination and equal treatment.

IV. UNFAIR COMPETITION & LICENCE REQUIREMENTS

With the offering of online games in the Netherlands, it will become possible for market players, who formerly operated in an unauthorised manner, to apply for a national licence and to start offering their services legally in accordance with the licensing conditions to be imposed by the Netherlands.

These operators however still have an important unfair competitive advantage over the other operators (including land based casinos), dating from the period during which they provided their services within the territory of that Member State in an unauthorised manner. In order to create equal opportunities on the market, this unfair competitive advantage needs to be levelled out before any licence can be granted.

For this purpose, ECA recommends that all operators, who formerly provided their games in an unauthorised manner, and now apply for a licence in the Member State concerned, are obliged to close down and delete their client database before applying for a licence in that Member State. Automatic transfers of client accounts should not be possible and neither should it be done without the consumer's explicit consent. No transfer of funds may be undertaken, the account operated without a licence must be emptied and closed, and new funds provided to the new, legal account.



In conclusion and on behalf of the ECA, I would like to kindly thank you again for inviting the ECA to provide its comments on your draft legislation, and therefore, also your consideration of the points discussed above.

The ECA of course remains at your and your staff's disposal for any further information you may require.

Yours sincerely,



Per Jaldung

Chairman ECA