[translation from Dutch]

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 21 March 2007
2002/5443
C (2007) 1036

His Excellency Mr Bernard Rudolf BOT
Minister of Foreign Affairs
Bezuidenhoutseweg 67
2500 EB The Hague

Excellency,

I hereby remind you of the first letter of notice (ref. SG(2006)D/201637), which was sent to you on 10 April 2006, and should like to draw your attention again to the regulations contained in Dutch legislation that prohibit the organisation or promotion of sports contests offered by suppliers holding a licence granted by a Member State other than the Netherlands.

1. WITH REGARD TO THE FACTS

1. The complaints filed with the Commission show that Article 1 of the Dutch Betting and Gaming Act of 10 December 1964 (hereinafter: 'WoK'), which prohibits the organisation of games of chance or the promotion of participation in the same, appears to be incompatible with the basic principle of the freedom to provide services as defined in Article 49 of the EC Treaty. The complaints have been filed by licensed suppliers of games of chance established in other Member States. As a result it has come to the Commission's notice that licensed suppliers of games of chance in other Member States may not offer their services cross-border in the Netherlands unless the competent Dutch authorities have granted a licence.

2. On 10 April 2006 the Commission sent the Dutch authorities a letter of notice. In this letter the Commission took the position that by imposing restrictions on the enabling of and the promoting of the participation in games of chance unless the competent authorities have granted a licence the Netherlands does not comply with its obligations under Article 49 of the Treaty establishing the European Community. The Commission in particular pointed out ????? Moreover, Article 1 of the WoK also constitutes a restriction on Article 49 of the Treaty insofar as it contains a prohibition on the promotion of participation in and advertising for games of chance offered by licensed suppliers established in other Member States.

3. About the possible justification of the restrictions on the freedom to offer services as contained in Article 1 of the WoK the Commission reasoned that the Member State's financial interests and the generating of revenue for charity in themselves are not necessarily a valid justification of the restrictions. About

consumer protection and the prevention of gaming addition the Commission reasoned that the Dutch authorities incite and encourage consumers to take part in games of chance and that for that reason it is doubtful whether they are entitled to rely on this justification. About the prevention of economic offences and money laundering the Commission reasoned that those possible justifications are invalid given the supervision to which the lawfully licensed suppliers established in other Member States are subject and given the EU laws on money laundering.

4. The Dutch authorities replied to the letter of notice by letter of 20 July 2006 (ref. JIZ-20151/06, SG/CdC(2006)A/5787), in which they stated that although the WoK does constitute a restriction on the freedom to provide services, this restriction is not in conflict with the limits set by the Court of Justice. They pointed out that according to the Court of Justice's case law restrictions on the freedom to provide services that arise from national measures are acceptable if they are justified by compelling reasons in the public interest. The Dutch authorities further argued that the Court of Justice has declared that even if a game of chance has been regulated in a Member State in which the supplier is established this does not mean that other Member States should accept the services concerned unreservedly. The Dutch authorities hold that this decision comes within the national governments' scope for policy-making.

5. The Dutch authorities hold that the major policy objectives and justifications of the restrictions arising from Article 1 of the WoK have not been adopted in the memorandum *Kansspelen Herijkt* [Games of Chance Reviewed] to which the Commission refers, but that they have been formulated in the second progress report on games of chance from 2003.[1] The main objective is to regulate and control games of chance, with special focus on the prevention of gambling addiction, consumer protection and the prevention of illegality and criminality. In their reply the Dutch authorities also explain that the Dutch gaming policy is based on a so-called channelling principle. This means that a suitable lawful offer should provide for the apparent demand for games of chance to prevent illegality. The Dutch policy on gaming is coherent and systematic, which has been confirmed by recent rulings of Dutch judicial authorities. Reference is made in particular to a ruling of the Supreme Court of 18 February 2005 (LJN: AR4841) in which the Court reasoned that the Dutch gaming policy is compatible with the EC Treaty.

6. As the Commission in its conclusion did not refer to the specific Dutch provisions on sports contests, it intends discussing in this additional letter of notice, without prejudice to the contents and the conclusions of the letter of notice dated 10 April 2006, the restrictive effect of the WoK on services related to sports contests.

2. WITH REGARD TO THE LAW

2.1 Applicable Dutch Legislation

7. Article 1 of the WoK stipulates that in general it is not permitted:

[1] TK II 2002/03, 24 036 and 24 557, no. 280

a) to offer opportunity to compete for prizes or premiums if the winners are selected by chance on which the contestants in general cannot have any predominant influence, unless for this purpose a licence has been granted under this Act;

b) to promote participation in an opportunity as referred to under a), offered without a licence under this Act. It is also not permitted to promote such activities if organised abroad, including other European countries.

8. Article 3.1 of the WoK lays down rules for the grant of licences: 'Unless otherwise stipulated by this Act, a licence may be granted for an opportunity as referred to in Article 1, if such opportunity is offered solely to serve any public interest out of the proceeds. The licence will be granted by the Municipal Executive of the municipality where the winners will be selected if the prizes and premiums jointly do not exceed a value of EUR 4500 and by the Minister of Justice in the event of a higher value.'

9. Article 15.1 of the WoK relates to sports contests and reads as follows: 'A licence for the organisation of sports contests may be granted only in accordance with the provisions contained in this title.'

10. Under Article 16.1 of the WoK the Minister of Justice may grant just one licence for the organisation of sports contests.[2] The proceeds of this activity go to the public interest.

11. For sports contests the exclusive licence has been granted to Stichting de Nationale Sporttotalisator (De Lotto) and the proceeds are intended for sports, culture, social welfare, public health and other good causes. Since 1961 De Lotto has been offering sports games. In the Dutch Toto participants guess the outcome of 13 games (1-2-3-bets) and a percentage of the total stakes is paid out. The Lotto offers a modern variant of daily sports contests based on fixed odds, in which participants play against a bookmaker. This was started in the Netherlands in 1992. Participants have to be 18 years or older.

12. Under Article 49 of the EC Treaty the restrictions on the freedom to provide services within the Community are prohibited with regard to subjects of the Member States established in another country of the Community than that in which the recipients are established for whom the service is provided.

2.2 Restrictions on the Freedom to Provide Services

A. Organisation of Games of Chance

13. The Commission is aware that several licensed suppliers of games of chance established in other Member States are restricted in offering their services in the Netherlands. The Commission notes that pursuant to those provisions several

[2] 'Our Ministers of Justice and of Welfare, Public Health and Culture may, with an eye to the interests of institutions working in the public interest, in particular in the field of sport and physical education, culture, social welfare and public health, grant to one legal entity with full legal powers a licence for the organization of sports contests for a duration to be set by the ministers.

lawsuits have been initiated in the Netherlands against suppliers established in other Member States.

14. According to fixed case law of the Court of Justice Article 49 of the Treaty requires the elimination of restrictions on the freedom to provide services. All measures which prohibit, impede or render less attractive the exercise of such freedoms must be regarded as constituting such restrictions (ruling of 15 January 2002 in C-439/99, Commission v. Italy, Jurispr. Page I-305, paragraph 22; see in this context, with regard to the freedom to provide services, also the ruling of 20 February 2001 in C-205/99, Analir et al., Jurispr. Page I-1271, paragraph 21).

15. With regard to services related to sports contests the Court of Justice has ruled that Article 49 of the Treaty applies to services that a service supplier established in a Member State offers on-line or by telephone, so that any restriction on these activities constitutes a restriction on the freedom to provide services by such a supplier (see ruling of 6 November 2003 in C-243/01, Gambelli et al., paragraphs 53 and 54).

16. Further to the complaints received the Commission's letter of notice referred to above and the reply of the Dutch authorities the Commission remarks that where Member States subject the *providing* of certain games to prior approval, if this *restriction* is justified by compelling reasons in the public interest and the requirements for granting authorisation are not disproportional, those Member States should consider whether the same public interest *concerns* that justify the *restriction* are not *served* already by the rules of origin of the foreign service supplier. In this context the Court of Justice already held that '*if the criteria for notification of a licence lead to a unnecessary repetition of the evidence and guarantees already demanded in the state of establishment the Member State where the service is provided (…) in investigating the application and the notification of the licence (…) takes account of the evidence and guarantees already supplied by the operator in the exercise of its activities in the Member State of establishment*'.

17. Because of the fact that just a single licence may be granted for the organisation of sports bets and because of non-compliance with the checks and guarantees applicable to the supplier of such services in the country of origin Articles 1, 3, 15 and 16 constitute a restriction on Article 49 of the EC Treaty.

B. Promotion of Participation in Games of Chance

18. The Commission is aware that several licensed suppliers of games of chance established in other Member States are restricted in promoting their services in the Netherlands. The Commission understands that under Article 1.b of the Wok several lawsuits have been initiated against suppliers established in other Member States and media operators established in the Netherlands.

19. It is clear that the application of restrictive measures that imply a prohibition on the publication of advertisements for games of chance offered by licensed suppliers of sports contests and in particular those established in other Member States, clearly restricts the export of media services by Dutch newspapers and other media. The Court of Justice repeatedly stated that an undertaking that complies with the criteria of the Member State of establishment may invoke against that Member State the freedom to provide services if the services are

provided to recipients established in another Member State. The Court said that this applies in particular if a Member State restricts the right of press undertakings established in the territory of that Member State to offer advertising space in their magazines to potential advertisers from other Member States (see ruling of 8 March 2001 in C-405/98, Gourmet, Jurispr. Page I-1795, paragraphs 37 and 38).

20. The relevant restrictive measure also restricts the possibility of advertising agencies established in the EU to supply their services in the Netherlands and thus the possibility of suppliers of games of chance established in other Member States to advertise among the Dutch public.

21. In this context it should be noted that the Court of Justice also held that a measure such as the prohibition on advertisements – even if it does not have a discriminatory effect – affects primarily the cross-border offer of advertising space in sectors with an international character and thus constitutes a restriction on the freedom to provide services as referred to in Article 49 of the Treaty (see Gourmet, cited above, paragraph 39 and the ruling of 10 May 1995 in C-384/93 Alpine Investments, Jurispr. pageI-1141, paragraph 35). This applies to sports contests.

22. Given the above Articles 1, 3, 15 and 16 of the WoK also constitute a restriction on Article 49 of the Treaty insofar as the promotion of participation and placing advertisements.

23. In their response to the letter of notice the Dutch authorities do not at all dispute the existence of the above restrictions on the freedom to provide services but argue that those restrictions are justified by compelling reasons in the public interest in accordance with the Court of Justice's case law.

3. APPRAISAL OF THE JUSTIFICATION OF THE RESTRICTIONS

24. According to the case law of the Court of Justice Article 49 of the Treaty may be restricted only by – non-discriminatory – national measures if these:

- are justified by compelling reasons in the public interest insofar as this interest is not protected in the Member State in which the supplier is established;

- are not disproportionate, i.e. suitable to attain the objective sought, and are not exaggerated and cannot be replaced by less restrictive measures (see ruling of 25 July 1991 in C-76/90, Dennemeyer, Jurispr., page 4221).

25. In their response to the letter of notice the Dutch authorities argue that according to the second progress report on games of chance of 31 March 2003, as cited earlier, the primary policy objective of the Dutch government consists of regulating and controlling games of chance, with a special focus on the prevention of gambling addiction, consumer protection and the prevention of illegality and criminality.

26. In their response the Dutch authorities first state that the regulation of games of chance is based on a channelling view, which implies that by means of a suitable legal offer the demand for games of chance should be met to prevent illegality.

The legal offer should be sufficiently attractive and known to comply with the existing demand. Second, regulation in the Netherlands is based on the view that the competition should be restricted as much as possible and that the love for gaming should be exploited for particular gain; the proceeds from games of chance should go to the public interest.

A. A Member State's Financial Interest and the Use of the Proceeds from Games of Chance for the Public Interest

27. With regard to the policy objectives such as the use of a substantial portion of the proceeds from games of chance for charity or government initiatives the Commission in its letter of notice pointed out that although the Court of Justice held that a Member State's economic interest is not irrelevant the Court has repeatedly stated that the fact that games of chance organised by the state could make a substantial contribution to the financing of benevolent activities or activities in the public interest such as sports, cannot in itself be regarded as an objective ground for justification (see ruling of 21 October 1999 in C-67/98, Zenatti, Jurispr. Page I-7289, paragraph 36). Insofar as the justification derived from the protection of games of chance against competition to contribute to public interest causes should be regarded such that it intends protecting tax revenues in the Netherlands, the Commission further remarks that according to the Court of Justice's fixed case law the decrease in tax revenue is not included in the grounds listed in Article 46 of the EC Treaty and does not constitute a compelling reason in the public interest that can be invoked in the justification of a restriction on the freedom of establishment or on the freedom to provide services (see Gambelli et al., cited earlier, paragraph 61; see in this context also the rulings of 16 July 1998 in C-264/96, ICI, Jurispr. Page I-4695, paragraph 28 and of 3 October 2002 in C-136/00, Danner, Jurispr. Page I-8147, paragraph 56).

28. In their reply to the letter of notice the Dutch authorities argue that the criterion that the proceeds from games of chance should contribute to causes in the public interest in fact aims at consumer protection. Because the 'love for gaming is not exploited for private gain' waste and the individual pursuit of gain are prevented. The Dutch authorities argue that in the view of the Court of Justice this is related to consumer protection and thus constitutes a compelling reason in the public interest.

29. The Dutch authorities further remark that the generation of proceeds from games of chance and the 'payment to charity or the treasury' should be regarded as a side effect of the Dutch policy on gaming. The authorities point out that the Court of Justice in several rulings held that the financing of social activities from the proceeds from admitted games may be a favourable side effect only and not the actual ground for justification of the restrictive policy pursued. The Dutch authorities state that although the memorandum *Kansspelen Herijkt* mentions the generation of income, as referred to in the letter of notice, this memorandum is no longer current and no longer reflects the position of the Dutch government. As remarked earlier, the current objectives of the Dutch gaming policy have been set out in the second progress report referred to above.

30. Despite the above De Lotto's official objectives appear to be in conflict with the objectives invoked by the Dutch government in its reply to the letter of notice. Article 2 of the articles of association of De Lotto mentions just one objective:

31. 'The objective of the Foundation is

a) to raise funds by means of organising and holding games of chance, rendering services to third parties in the organisation of games of chance and organising and/or holding games of chance in cooperation with third parties or to cause others to do so;

b) to distribute the funds thus raised in the interest of the institutions of public interest, in particular in the field of sports, physical education, social welfare, public health and culture; and

c) to do anything related or conducive to the above'.

32. In this context it is also relevant that the 2005 annual report of De Lotto states that the funding of government initiatives is a primary objective of De Lotto. The second and third sentence of the annual report read as follows: 'De Lotto's position is clear: to maintain the current restrictive system. This ensures payment to beneficiaries.' The annual report goes on to state that De Lotto has a social responsibility to 'realise maximum payment to […] sports and other Good Causes' (emphasis added).

33. It follows from the above that the factual objectives of the Dutch gaming policy are contrary to the objectives invoked by the Dutch authorities in their reply to the letter of notice. Still, the reply gives rise to the conclusion that the Dutch authorities and the Commission agree that the financing of activities in the public interest cannot be regarded as an isolated justification of the restrictions arising from Article 1, 3, 15 and 16 of the WoK.

B. Prevention of Illegality and Criminality

34. With regard to the prevention of economic offences and money laundering the Commission in its letter of notice remarked that it did not find a valid justification for the restriction of all cross-border services for games of chance and especially of services offered by a licensed supplier who is lawfully established in another Member State where appropriate supervision is exercised. Such possible justification is even less valid if it is taken into consideration that Article 12 of Directive 91/308/EC (hereinafter to be called: 'the Money Laundering Directive') as amended by Directive 2001/79/EC and replaced by Directive 2005/60/EC requires the Member States to apply the provisions contained in that Directive to all professions and all categories of undertakings that engage in activities that are particularly likely to be used for money-laundering purposes. The Commission therefore declared that already under national legislation implementing Directive 91/308 as amended suppliers of games of chance may be required to report suspect activities to the authorities competent for fighting money-laundering activities. In their Member State of establishment those suppliers may be subject to other laws, regulations or codes of conduct, which provide for specific checks to prevent other forms of economic offences.

35. In their reply to the letter of notice the Dutch authorities dispute the absence of valid grounds of justification for the restriction on all cross-border services for games of chance and in particular on services offered by a licensed supplier lawfully established in another Member State where appropriate supervision is exercised. First, because Article of Directive 2005/60/EC (and previous directives) contain the express possibility that the Member States adopt or enforce stricter provisions to prevent money-laundering and the financing of terrorism. Second, because the objective of the Dutch policy on gaming is broader than just the reporting of money-laundering practices. Third, the authorities note that on repeated occasions the Court of Justice has accepted fraud prevention as a compelling reason in the public interest. On a final note the Dutch authorities argue, in response to the Commission's reference to the final report of the Working Party on the Betting and Gaming Act that although the current policy on gaming cannot fully prevent illegality and criminality it does cause a decrease.

36. In this context it should be noted that in its letter of notice the Commission did not contest that fraud prevention can be a compelling reason in the public interest. The Commission did not contest either that the Member States may adopt or enforce more stringent regulations to prevent money-laundering than those contained in the Money Laundering Directive. However, unlike the arguments used by the Dutch government in regard to illegal casinos the Commission remarks that the Dutch authorities' reply does not contain any evidence or reference to sports contests or illegal activities of suppliers of those services established in other Member States. Moreover, in their reply the Dutch authorities do not explain in detail why the contested restrictive measures, in particular those directed at the channelling of sports contests, are necessary to prevent illegal and criminal activities such as fraud. In particular, nowhere does the Dutch reply point out why suppliers of sports bets who have been granted a licence in another Member State and in that Member State are required to supervise and prevent illegal aspects are not capable of contributing to attaining such objectives in the public interest in the Netherlands. Under those circumstances the restrictions arising from Articles 1, 3, 15 and 16 are unacceptable.

37. With regard to the Dutch government's argument that although illegal or criminal activities cannot be prevented entirely but can be reduced by the designing of a fitting and regulated legal offer, the Commission remarks that the Dutch authorities did not adduce any evidence to substantiate their argument. The Commission also refers to a recent documentary entitled 'Donner's Jackpot'[3], which showed that the market of illegal games of chance in the Netherlands flourishes.

38. The Commission cannot derive any valid justification from the Dutch government's reply to the letter of notice for the restriction on all cross-border services for games of chance and in particular on services offered by a licensed supplier who is lawfully established in another Member State in which supervision is exercised comparable or equivalent to that in the Netherlands. The Commission therefore does not hold that the restrictions arising from Articles 1,

[3] Broadcast by the Dutch public service broadcaster on 6 June 2006 and available at http://omroep.vara.nl/mediaarchief.jsp?maintopic=vara_media_archief

3, 15 and 16 of the WoK can be justified by, are necessary for or are proportionate to the objective of preventing illegality and criminality.

C. Prevention of Gambling Addiction and Consumer Protection

39. With regard to consumer protection and the prevention of the spreading of gambling addiction the Court of Justice stated that restrictions may be justified by compelling reasons in the public interest such as consumer protection, fraud prevention and the prevention of money squandering is encouraged by gambling. The Court of Justice, however, also declared that such restrictions should be suitable also to realise those objectives, i.e. that they should contribute to the activities related to betting being restricted coherently and systematically (see ruling in Gambelli et al., cited above, paragraph 67).

40. With regard to consumer protection the Court of Justice has remarked that if the authorities of a Member State incite and encourage consumers to take part in lotteries, games of chance or bets to swell the coffers, the authorities of such state may not, to justify such measures, invoke that the public order benefits from restrictions on gaming opportunities (see Gambelli et al, as cited, paragraph 69).

41. In their reply to the letter of notice the Dutch authorities argue first that the Commission is wrong in referring to the decision in Gambelli. According to the authorities that ruling should be viewed against the background of the situation then effective in Italy, with a very restrictive policy on foreign games of chance on the one hand and an expansion of the offer to finance causes in the public interest on the other. The Dutch authorities argue that the Dutch context is entirely different. The objective of the Dutch government is to channel the existing demand for games of chance and to protect consumers and prevent illegality as a result. This justifies, in the opinion of the Dutch authorities, the high advertising expenses of De Lotto; in their opinion there should be not only a legal offer from a channelling point of view, but advertisements should divert the public's attention to this legal alternative.

42. Second, the Dutch authorities point out to the Commission that at the request of the Minister of Justice the national licensees and gaming machine association VAN have been working since 2004 on a code of conduct and advertising code, which took effect on 15 February 2006. The reply of the Dutch authorities to the letter of notice, which was signed by the Permanent Representative, includes the sentence: 'Until the evaluation of the code of conduct and advertising code in 2007 I will closely follow the developments in the gaming offer of all suppliers.'

43. Third, the Dutch authorities do not adduce evidence of their supervisory policy on sports contests, but they remark that independent audits have demonstrated that in 2004 the advertising expenses for television, radio, direct mail and sponsoring of the joint licensees fell by 9% compared to 2002. For De Lotto advertising expenses dropped from 5.6% in 2002 to 5.2% in 2004. The authorities further argue that in 2001 De Lotto with 14.1 million Euros in advertising expenses spent the least of all gaming licensees and that in 2005 this amount fell to 12.6 million Euros. The Dutch authorities further point out that De Lotto does not appear in the Dutch top 100 of advertisers for entrepreneurs in consumer products and that they disagree with the Commission's view that De

Lotto is one of the biggest advertisers in the Netherlands.

44. The Commission should like to emphasise that in their reply the Dutch authorities do not contest the fact that De Lotto uses a wide range of innovative commercial communication campaigns such as sending advertising material by unsolicited post and by unsolicited e-mail, and the sending of free lottery tickets and a money-back guarantee if a subscriber does not win a prize within a year. Moreover, although the Dutch government refers to cuts in advertising expenses, including sponsoring, in the period 2002-2005, advertising expenses that represent more than five percent of the turnover are substantial. The Commission also commented that the figures on expenditure on advertising and promotions that are listed in the annual report merely relate to media expenses and do not cover any other marketing expenses, such as point-of-sales advertising and promotional activities. With incomplete information on marketing expenses other than advertising it is clear that the actual marketing expenses exceed five percent of the turnover and that the total expenses on promotional activities are higher than suggested by the Dutch government in its reply.

45. In response to the claim of the Dutch authorities that the advertising by gaming licensees serves only to channel the existing demand for games of chance the Commission should like to make two remarks. First the Dutch authorities do not adduce any evidence with regard to sports contests. Second, the Dutch authorities took several decisions that facilitate the offering of games of chance, including the following:

- In 2006 the Minister granted permission to extend the gaming rules of Holland Casino to include Multipoker[4];
- in 2004 the Dutch Gaming Control Board approved the extension of the licence of Scientific Games Racing BV to include offers by text message;[5]
- in 2004 the Minister of Justice approved further expansion of the gaming offer of De Lotto; De Lotto extended the offer of its products on-line and by text message;[6]
- late 2003 Holland Casino was granted permission to relocate its casino from Zandvoort to Haarlem, not for objectively justifiable reasons such as players' protection or fraud prevention but solely on 'commercial grounds' as stated in the recommendation of the Gaming Control Board;[7]
- late 2003 the Postcodeloterij was extended to include the *Gouden Koffer Spel;*[8] and
- in 2003 the Gaming Control Board approved the extension of the licence of Scientific Games Racing BV to make offers on-line.[9]

These expansive decisions do not appear to be a necessary response to an existing demand for games of chance. Moreover, the Dutch authorities did not present any analyses that cover the effect on the demand for games of chance, addiction risks, the offer of legal games of chance, the offer of illegal games of chance.

[4] http//www.gamingboard.nl/adviezen/06adv271.pdf
[5] http//www.gamingboard.nl/adviezen/04adv312.pdf
[6] http//www.gamingboard.nl/adviezen/04adv410.pdf
[7] http//www.gamingboard.nl/adviezen/03adv950.pdf
[8] http//www.gamingboard.nl/adviezen/03adv1029.pdf
[9] http//www.gamingboard.nl/adviezen/03adv1163.pdf

Such analyses should have preceded the above decisions expanding the offer (and possibly the demand).

46. A clear example showing that the Dutch policy is not intended as a response to an existing demand can be found on page 9 of the 2005 annual report of De Lotto. It is remarked that scratch cards are impulse products and that therefore the comparatively low number of sales points in the Netherlands has an adverse effect on the turnover. Subsequently the conclusion is drawn that 'for this reason options are being explored to broaden distribution and to thus reach our customers better.' The Commission remarks that a policy that is based on the fact that certain games of chance are typical impulse products and for that reason constitute a special risk and that tries to benefit from this fact by extending the distribution of these services is incompatible with the channelling view on which the Dutch authorities rely.

47. Another example of the Dutch policy's creating a demand became apparent from the documentary 'Donner's Jackpot' referred to earlier. This documentary shows that Holland Casino's marketing policy includes a strategy that should prevent people from playing at Holland Casino just once or several times, which in the internal marketing plan is regarded as a problem. The marketing plan contains a detailed strategy to encourage occasional players to play regularly and to turn beginning players into lucrative regulars.

48. The Commission further remarks that by necessity the Dutch licensees not only work from the existing demand but perhaps do not form an alternative to the illegal offer either. In this context it is interesting that in a press release dated 28 March 2003[10] the Minister of Justice commented: 'Any extension of the legal casino offer will have positive effects on turnover and employment but if the prevention policy remains the same is expected to increase gambling addiction […] especially if it is considered that the extension of the legal casino offer is expected to have a minor effect on the illegal offer'(emphasis added). According to this reasoning this minor effect on the illegal offer should also apply to sports contests.

49. Despite the above the Minister of Justice, after the publication of the above press release, approved the opening of new casinos and filed a bill amending the Dutch Betting and Gaming Act, pursuant to which the on-line offering of games of chance is licensed to Holland Casino exclusively, which holds the monopoly on this activity.[11] A study commissioned by the Dutch Gaming Control Board[12]confirmed that this initiative would increase the demand in stead of replacing the illegal offer. According to this study the number of on-line participants in games of chance will rise from 277,000 to 535,000 (almost double as many on-line players). This expectation, however, is based on a survey in which respondents were asked to predict their behaviour of Holland Casino (or a similar well-known brand) would offer games of chance on-line. The study did not take account of the consequences of the expected additional promotional and marketing activities, which means that the increase of the number of players on-line could be much bigger.

[10] http://www.minaz.nl/data/1048859084.pdf
[11] TK II 2005/06 30362 no. 2
[12] *Kansspelen via nieuwe media* 2005 Motivation, Amsterdam, December 2005

50. In its notice 2005/0388/NL the Commission already expressed its concern about the above bill and reached the conclusion that the restrictions arising from the proposed Article 27m of the notified draft regulation could have far-reaching implications for the freedom to provide gaming services. The Commission argued in particular that a licensed supplier established in another Member State will be hindered in advertising a full series of games of chance and additional advertising services on-line that are usually offered electronically, at a distance and at a consumer's individual request. In this notice the Netherlands was requested to consider taking measures that would impose fewer restrictions on the trade within the Community.

51. The Commission also remarks that De Lotto offers on-line sports contests and that the Dutch authorities do not deem an amendment to the WoK necessary allowing this. The bill partially amending the WoK cited earlier shows that the Dutch authorities do not regard on-line bets as new games of chance as defined in the WoK, but just as new methods to purchase services for which licences have already been granted (they consider this e-commerce). Only on-line games of chance with a random generator would be new games of chance requiring an amendment to the WoK.

52. With regard to the Dutch authorities' suggestion that the code of conduct and advertising code on games of chance are an example of the Dutch restrictive policy the Commission remarks first that on 10 February 2005 the Dutch Minister of Justice stated that the advertising code should contain quantitative restrictions.[13] However, the Commission noticed that the code does not contain any quantitative elements. The provisions of the code are worded in general terms and in terms of content are so generic that they cannot be expected to have a substantial effect on the licensees' advertising policy. The code is not legally binding and no criminal law sanctions are imposed on breaches. On a final note the Commission remarks that such a code existed already for casino games and gaming machines[14] and in the Commission's view this code did not have the desired restrictive effect. Given the above the Commission does not think it likely that the code of conduct and advertising code on gaming will result in (significant) qualitative or quantitative changes in the advertising policy of the Dutch licensees.

53. The Dutch authorities' claim that the past years saw a fall in the advertising expenses of the gaming licensees and in particular of De Lotto leads the Commission in the first place to comment that an independent, unpublished survey by Nielsen Media Research (attached hereto) has demonstrated that De Lotto's advertising expenses for television, radio, newspapers, brochures, entertainment centres, cinemas, the Internet and several types of magazines were EUR 6,812,000 in 2004, which rose to EUR 8,615,000 in 2005. The actual increase of the commercial communication, however, is higher, as the 2005 annual report (page 7) of De Lotto shows that advertisements increasingly take the form of the direct approach of target groups by telephone and e-mail. These commercial communication expenses have not even been included in the figures

[13] TK 24 557 and 29800 VI, no. 47, page 9

[14] Advertising Code Casino Games and Gaming Machines ('RCK'), contained in the Dutch Advertising Code.

of Nielsen Media Research (to which the Dutch authorities refer as well).

54. Second, the Commission expresses its surprise at the absolute figures on advertising expenses submitted by the Dutch authorities. The Dutch authorities claim that advertising expenses, including sponsoring, by De Lotto amounted to EUR 14,100,000 in 2004 and EUR 12,600,000 in 2005. The annual reports of the Gaming Control Board and De Lotto, however, clearly mention figures of EUR 20,900,000 and EUR 18,800,000 respectively. The Commission asks the authorities to explain the differences of 48% and 49% respectively between the figures of De Lotto and the Gaming Control Board on the one hand and those presented by the Dutch authorities in their reply to the letter of notice on the other.

55. Third, the Commission points out that according to the data of Nielsen Media Research the advertising volume with which residents of the Netherlands are confronted has clearly increased over the past four years. The number of advertisements of De Lotto has risen from 3909 in 2002 to 5554 in 2004 (a 42% increase). The total duration of De Lotto's radio commercials has increased from 39,795 seconds in 2002 to 57,410 seconds in 2004 (a 44% increase). The total duration of TV-commercials has gone up from 31,595 seconds in 2002 to 45,825 seconds in 2004 (a 45% increase).

56. Fourth, it is not clear whether all the advertising expenses of De Lotto have been entered into the books under the heading 'marketing and advertising' or that there are any advertising expenses that come under another heading. Another possibility is that marketing expenses, at least on paper, are incurred by another company (such as '*Mazzelsparen*' , the marketing costs of which are borne by SNS Bank). The Commission emphasises the importance of detailed and full information on specific categories of marketing and advertising expenses. Such information should be entered into the licensees' annual accounts and be public. A transparent marketing and advertising policy is a prerequisite to rely on consumer protection and the reduction of gambling addiction as policy objectives.

56. Finally the Commission remarks in this context that a quantitative appraisal of the promotion and advertising of games of chance is not sufficient to determine to what extent a Member State incites and encourages its residents to gamble. To assess the nature of the advertising policy pursued and to determine the possible consequences a qualitative appraisal is required. The Commission notes[15] that in the Netherlands the advertising of games of chance is increasingly characterised by the direct approach of the potential consumer (by telephone, e-mail or text message) and that games of chance are increasingly presented as a normal consumer service. The assessment of advertising trends should consider developments in the form and contents of advertising.

58. Given the above the Commission – despite the Dutch authorities' reply to the letter of notice in which they invoke the restrained advertising policy of the Dutch licensees and of De Lotto in particular – holds the view that several qualitative and quantitative elements indicate that in this context the Dutch government pursues a policy of expansion for all games of chance.

[15] See, for instance, page 9 of the 2005 annual report of De Lotto.

59. On a final note the Commission remarks that with regard to the fighting of gambling addiction De Lotto itself argues that sports contests do not present a risk of addiction.[16] In a letter to the Lower House dated 31 October 2002[17] the Minister of Justice took a similar position: 'The risk of gambling addiction is determined by several elements, i.e. the type of game (short odd and long odd games of chance), the stake possibilities, the prize and the accessibility of the offer. For instance, short odd games of chance are regarded as risky games, while long odd games of chance present a minor risk. […] Long odd games of chance are characterised by a long(er) period between the stakes and the outcome and the possibility to stake again. Examples of long odd games of chance are number lotteries and sports contests.' As De Lotto does not have a policy on gambling addiction the conclusion is justified that the fighting of gambling addiction is not one of De Lotto's objectives.

60. In response to the Dutch authorities' claim that the number of compulsive gamblers fell from 70,000 to 40,000 the Commission points out first that these two estimates were acquired by different methods. The estimate of 70,000 from 1996 was based on a study performed just in the province of Noord-Holland, which was then simply generalised for the entire Netherlands, while the estimate of 40,000 from 2006 was based on a random survey covering the entire Netherlands. Second, the Commission establishes that the Dutch government has not carried out any studies of the number of compulsive gamblers from 1996 up to and including 2005. It is therefore impossible to assess the consequences of the gaming policy over the past years. Finally, the Commission comments that Holland Casino is the only Dutch licensee with a policy on gambling addiction and that the Dutch government does not give information on the sums spent on the fighting of gambling addiction, while this information is available for other forms of addiction.

61. In view of the reply of the Dutch government and the actual developments in Dutch gaming policy the Commission does not hold the opinion that the restrictions that arise from Articles 1, 3, 15 and 16 of the WoK can be justified by or are necessary for or are proportionate to this compelling reason.

62. Consequently, the Commission of the European Communities holds the view that Articles 1, 3, 15 and 16 constitute restrictions on the freedom to offer games of chance for licensed suppliers established in other Member States, which cannot be justified by compelling reasons in the public interest and are therefore incompatible with Article 49 of the EU Treaty.

4. CONCLUSION

As a result the Commission of the European Communities holds the view that by imposing restrictions on the offering of opportunity to and promoting the participation in games of chance by requiring suppliers lawfully established in other Member States to have a licence to be granted by the competent Dutch authorities and by determining that just one licence to organise sports contests is granted pursuant to Articles 1, 3, 15 and 16 of the Dutch Betting and Gaming Act of 10 December 1964 the Kingdom of the Netherlands has not complied with its obligations under Article 49 of the Treaty establishing the European Community.

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[16] Report '*Kans op een goede wet*', page 8.
[17] TK, volume 2002-2003, 28600, no. 58, page 1.

Pursuant to Article 226 of the Treaty establishing the European Community the Commission requests the Dutch government to comment on the position set out above within two months of receipt of this letter.

The Commission, however, reserves the right to deliver a reasoned opinion as referred to in said Article after taking notice of those comments or if those comments are not received by the Commission within the set term.

Respectfully yours,

For the Commission
Charlie MCCREEVY
Member of the Commission

Overview of advertising volumes gaming industry 2001-2006
(source: Nielsen Media Research)

		Calendar year 2001 (number of advertisements)	**Calendar year 2001 (volume in pages)**	**Calendar year 2001 (volume in seconds)**
	Gaming industry			
Type of medium	TV			
Type of medium	Radio			
Type of medium	Print			
Type of medium	Out of home			

		Calendar year 2002 (number of advertisements)	**Calendar year 2002 (volume in pages)**	**Calendar year 2002 (volume in seconds)**
	Gaming industry			
Type of medium	TV			
Type of medium	Radio			
Type of medium	Print			
Type of medium	Out of home			

		Calendar year 2003 (number of advertisements)	**Calendar year 2003 (volume in pages)**	**Calendar year 2003 (volume in seconds)**
	Gaming industry			
Type of medium	TV			
Type of medium	Radio			
Type of medium	Print			
Type of medium	Out of home			

		Calendar year 2004 (number of advertisements)	**Calendar year 2004 (volume in pages)**	**Calendar year 2004 (volume in seconds)**
	Gaming industry			
Type of medium	TV			
Type of medium	Radio			
Type of medium	Print			
Type of medium	Out of home			

		Calendar year 2005 (number of advertisements)	**Calendar year 2005 (volume in pages)**	**Calendar year 2005 (volume in seconds)**
	Gaming industry			
Type of medium	TV			
Type of medium	Radio			
Type of medium	Print			
Type of medium	Out of home			

		2006 up to and including 28 May (number of advertisements)	2006 up to and including 28 May (volume in pages)	2006 up to and including 28 May (volume in seconds)
	Gaming industry			
Type of medium	TV			
Type of medium	Radio			
Type of medium	Print			
Type of medium	Out of home			

Gaming Industry is based on the following advertisers:
St. Nationale Sporttotalisator Rijswijk Zh
St. Uitvoeringsorg. Finan. Akties Amsterdam
Ladbroke
Holland Casino Hoofddorp
Nationale Postcode Loterij Amsterdam
St Expl Ned Staatsloterij ´s Gravenhage
Stichting Grote Clubactie Tilburg
NOC*NSF Arnhem
Fair Play Centers Kerkrade
Nationale Loterij België (BE)
Scientific Games Racing s'Gravenhage
Stichting FZZ Amsterdam
Lottopool Doetinchem
Hommerson Gouda
BPL Lottosysteem Weert
Noord Casino's Heerenveen
Ticcit Maarsbergen
IMR Roermond
Flash Amusement Center Nijmegen

Type of Medium
The following types of medium are registered: **Television** Commercial TV Public TV **Radio** National commercial radio National public radio Local public radio **Print** Daily newspapers Trade journals General interest magazines: - Car and motor magazines - Computer magazines - Culinary magazines - Family magazines - For the young - Management

- Men's magazines - News magazines - Parenting magazines - Travel and leisure - Radio and TV guides - Special interest general - Sports - Women's magazines - Lifestyle/home improvement Out of home: Indoor Outdoor Mobile advertising

Overview of advertising volumes De Lotto 2001-2006
(source: Nielsen Media Research)

		Calendar year 2001 (number of advertisements)	**Calendar year 2001 (volume in pages)**	**Calendar year 2001 (volume in seconds)**
	St Nationale Sporttotalisator Rijswijk ZH			
Type of medium	TV			
Type of medium	Radio			
Type of medium	Print			
Type of medium	Out of home			

		Calendar year 2002 (number of advertisements)	**Calendar year 2002 (volume in pages)**	**Calendar year 2002 (volume in seconds)**
	St Nationale Sporttotalisator Rijswijk ZH			
Type of medium	TV			
Type of medium	Radio			
Type of medium	Print			
Type of medium	Out of home			

		Calendar year 2003 (number of advertisements)	**Calendar year 2003 (volume in pages)**	**Calendar year 2003 (volume in seconds)**
	St Nationale Sporttotalisator Rijswijk ZH			
Type of medium	TV			
Type of medium	Radio			
Type of medium	Print			
Type of medium	Out of home			

		Calendar year 2004 (number of advertisements)	**Calendar year 2004 (volume in pages)**	**Calendar year 2004 (volume in seconds)**
	St Nationale Sporttotalisator Rijswijk ZH			
Type of medium	TV			
Type of medium	Radio			
Type of medium	Print			
Type of medium	Out of home			

		Calendar year 2005 (number of advertisements)	**Calendar year 2005 (volume in pages)**	**Calendar year 2005 (volume in seconds)**

	St Nationale Sporttotalisator Rijswijk ZH			
Type of medium	TV			
Type of medium	Radio			
Type of medium	Print			
Type of medium	Out of home			

		2006 up to and including 28 May (number of advertisements)	2006 up to and including 28 May (volume in pages)	2006 up to and including 28 May (volume in seconds)
	St Nationale Sporttotalisator Rijswijk ZH			
Type of medium	TV			
Type of medium	Radio			
Type of medium	Print			
Type of medium	Out of home			

Type of Medium
The following types of medium are registered: **Television** Commercial TV Public TV **Radio** National commercial radio National public radio Local public radio **Print** Daily newspapers Trade journals General interest magazines: - Car and motor magazines - Computer magazines - Culinary magazines - Family magazines - For the young - Management - Men's magazines - News magazines - Parenting magazines - Travel and leisure - Radio and TV guides - Special interest general - Sports - Women's magazines - Lifestyle/home improvement Out of home: Indoor Outdoor Mobile advertising