

1. On 2 December 2005 the District Court of Breda rendered judgment in the case between Compagnie Financière Régionale B.V. ("CFR") (backed by French casino giant Tranchant) and the Ministers of Justice and Economic Affairs.
2. CFR applied for a permit to open a casino in Bergen op Zoom. The application was rejected because of Holland Casino's monopoly. The Court nullified the decision not to grant a permit because it found that the decision was not adequately motivated. The Court contemplated that the Ministers had not demonstrated that their casino policy is systematic en coherent.
3. The Breda Court takes a completely different approach than other Dutch Courts. So far the Dutch monopolist permit holders (most notably the Lotto) have won several interim judgments against foreign operators. Besides the Lotto barely won in the first case on the merits decision, the judgment of the Arnhem Court of 31 August 2005, in which Ladbrokes was ordered to block its website for Dutch residents. It should be recalled that the Arnhem Court in its interim judgment of 2 June 2004 in said matter ruled that the commercial presence of Dutch permit holders was so big, that it believed there was no coherent and systematic restrictive policy. The Court than preliminary ruled that banning operators from other EC Member States violated the EC Treaty. This interim judgment caused a lot of political turmoil and made the Minister of Justice claim that he was pursuing a restrictive policy. Notwithstanding the political debate it came as a surprise that the Arnhem Court in its final decision suddenly took a completely different approach than it did in the interim judgment. The Arnhem Court once in a sudden believed that it could only very marginally check the facts and that the Minister should be believed on his words. Therefore the Court ruled that Dutch gaming policy once in a sudden was restrictive.
4. The Breda Court is of the opinion that the monopoly to offer casino games contained in the Dutch Hazard games Act is a restriction to the freedom to provide services set out in Article 49 EC Treaty. Referencing the ECJ Gambelli judgment the Court stated it has to investigate whether the ban on CFR is suitable, meaning it had to investigate whether Dutch casino policy systematically and coherently restricts casino's.
5. The Court notes that Holland Casino has been marketing its casino's aggressively over the last years. Recently the Minister of Justice has caused Holland Casino to stop the sponsoring of the Dutch premier League, which, according to the Minister, makes clear that Dutch gaming policy is restrictive. As to this "cosmetic" measure the Court is of the opinion if it were to be assumed that the termination of this contract will lead to a decreased presence of Holland Casino in society and the media, the question also arises whether, to what extent and in what term the effects will decrease – in particular encouragement of the demand – that were envisaged and materialised in the period in which Holland Casino did have a strong presence in society and in the media.
6. Although the Court does not explicitly mention the ECJ Lindman case, it explicitly states that the Ministers have to substantiate their arguments. In para. 2.11 the Court mentions:

"If the defendants want to make reliable statements about the positive effects of their policy on said objective and sub-objectives (canalizing gambling, prevention of addiction, consumer protection and prevention of illegality and criminality) and thus about the answer to the question whether the coherence and systematic structure as referred to in paragraph 67 of Gambelli apply, it is in the Court's view important to regularly study the effect of the defendants' policy decisions – both actively and passively – on (for instance) marketing or the expansion of the number of legal casinos on that objective and sub-objectives."

The Court notes that the Ministers have failed to submit any convincing factual evidence to support their view.

7. In para 2.12 the Court very clearly states that in the event that the Ministers when reconsidering the permit application can not demonstrate that their policy is systematic and coherent, application of the Dutch Hazard Games Act against CFR violates EC law, meaning that the Hazard Games Act can not be applied against CFR.

8. The Breda judgment clearly puts things back on tracks again. In line with the interim judgment of the Arnhem Court of 2 June 2004, the Breda Court gives betting operators from other EC Member States strong arguments to legally offer their services to Dutch residents, based on the facts. As long as the Netherlands allows its monopolists to behave as commercial operators on such large scale and there is no proof for the effectiveness of Dutch policy, operators from other Member States can not be banned.

9. Clearly Dutch Courts are struggling with gaming. In the near future a case on the merits judgment is expected from the Den Haag Court in the case of Interwetten and Betfair v Lotto. Also Ladbrokes in the meantime has appealed from the decision of 31 August. The coming period will therefore see whether Dutch Courts will follow the most recent approach by the Breda Court or the approach by the Arnhem Court. Possibly referral to the ECJ is needed to put an end to the question of how EC law should be applied.

Advocaat Polo van der Putt
Lovells
Frederiksplein 42
Postbus 545
1000 AM Amsterdam
+31 20 55 33 600
polo.vanderputt@lovells.com
www.lovells.com

isa-casinos.de – world wide casino guide