



The Road to Regulation

The Netherlands takes some early steps towards the regulation of online gaming.

2011 is proving to be the year in which the established regulatory architecture for all permitted forms of gaming is undergoing a substantial redesign. One of the key elements in what can be considered, in many respects, to be a 'back to the drawing board' approach is the proposed introduction of a regulatory framework for online gaming. Whilst the plans of a former Minister of Justice to permit the incumbent casino monopolist to provide online gaming services for a trial period of three years were rejected by the upper house of parliament in April 2008, a change in government in October 2010 has given renewed impetus to efforts to provide a regulatory framework for online gaming.

This brief article will provide an overview of the existing situation which stems from legislation dating back to 1964 with the Dutch Gaming and Betting Act (Wet op de Kansspelen, hereinafter 'the 1964 Act'), the nature of factors acting in combination which call for reform and a look ahead to the anticipated changes.

Existing legal framework and market structure

Under the 1964 Act, as amended in a piecemeal fashion in the following decades, all forms of gaming offered in return for prizes or premiums are prohibited, unless authorised. Leaving aside the amusement arcade sector, all forms of gaming are supplied by a monopolist. Two permanent monopolies prevail; one being the

national lottery (Staatsloterij) and the other being Holland Casino which operates the 14 casino venues across the Netherlands. So-called semi-permanent monopolies exist to supply horserace betting (operated by Sportech), whilst three exclusive licences have been awarded to a single undertaking, De Lotto, for the provision of sportsbetting, lotto games and an instant lottery (i.e. scratch cards). In addition to the aforementioned lotto and lottery services, three charity lotteries, operated by the same public liability company, operate on the basis of semi-permanent licences (the Nationale Postcode Loterij, the BankGiro Loterij and the Vrienden Loterij).

Online gaming is not recognised by the 1964 Act and, therefore, it is not possible for the government to authorise it. Nevertheless, this does not mean that domestic operators don't currently have an online presence. The licences awarded for the provision of sportsbetting, lotto and horserace betting recognise the right of the operator to provide services via the Internet. Implicit authorisation is given by the government in the case of the Staatsloterij and the charity lotteries through ministerial approval of the rules of participation which regulate the relationship between the operator and consumer. These approved rules permit the provision of services via the Internet. The Netherlands does not consider that such Internet-based services are online gaming but, rather, amount to 'e-commerce' – that is to say an alternative avenue to supply existing

offline services via the Internet. According to the government, there is presently no domestic supply of online gaming.

Pressure for change

Regardless of this official position, online gaming is rife within the Netherlands. In August 2010, the Advisory Commission on Online Gambling in its report 'Legalization of Online Betting and Gambling', found that more than half a million Dutch citizens participated in online gaming. Poker was by far and away the most popular form of online gaming, followed by casino games and gaming machines. So as to extend the protection offered by the regulatory regime to Dutch citizens playing online, the Commission recommended that online poker be regulated under Dutch law.

Additional pressure for change comes in the form of the Court of Justice of the European Union (CJEU) case-law with regard to Luxembourg. In addition to the generally applicable case-law concerning the proportionality of restrictive measures, two decisions have been delivered which specifically concern the Netherlands, namely Betfair (C-203/08) and Ladbrokes (C-258/08). In its Betfair ruling, the CJEU held that awarding a licence, or renewal thereof, without an open and transparent procedure, even in the case that an exclusive (i.e. monopoly) licence is being awarded, amounts to an unjustifiable restriction of the freedom to provide services unless a very narrowly drafted exception is found to be applicable by the

national court. The duty to award the licence in a transparent manner is inapplicable where it is found that the operator in question is a “public operator whose management is subject to direct State supervision or a private operator whose activities are subject to strict control by the public authorities,” (Betfair, para. 59).

On March 23, 2011, the Council of State (Raad van State) found that De Lotto, the national incumbent in question, did not meet this exception and, therefore, concluded that the renewal of its licence is incompatible with EU law. All other semi-permanent licences have been awarded in the same manner, and are, therefore, also incompatible. There are no plans for an immediate open licensing procedure to replace the improperly awarded licences but such procedures will fall within the remit of the forthcoming Gaming Authority.

On the same day as the Betfair decision, the CJEU responded to the preliminary questions referred to it by the Hoge Raad (Supreme Court) in the Ladbroke's case. As of yet, the Hoge Raad has not delivered its decision on the compatibility of other aspects of the Dutch regulatory regime with EU law, but the guidance offered by the CJEU is particularly interesting. Whereas Betfair concerned the compatibility of the granting of market access, Ladbroke's focuses upon compatibility in terms of the actual practice of the regulated operator. Dutch law was found to seek to curb addiction amongst consumers whilst combating crime and fraud, the latter permitting an expansionist policy against a background of measures restricting internal market freedoms. In determining whether a consistent and systematic balance has been struck between these two objectives, the CJEU held that the following elements must be considered: there should be no excessive incitement or encouragement to gamble, thus, the desire to obtain funds for financing social activities should not move beyond an ‘incidental beneficial consequence’ of the restrictive measure. Secondly, the scale of illegal gaming must actually constitute a problem and permitting the incumbent operators to increase their supply must constitute an appropriate means to alleviate this problem. Thirdly, as part of the appropriate reconciliation of the two objectives, effective supervision of the operator by the competent national authority must actually prevail.

Overview of proposed reforms

Against the background of the challenges posed by the Internet, and a few days before the final decision in Betfair, the State Secretary for Safety and Justice sent a letter to the lower house of parliament (Tweede Kamer) on March 19, 2011,

which marked a seismic shift in the regulation of all forms of gambling and gaming. Existing objectives of Dutch gambling policy will remain of key importance during the regulatory reform; namely, the prevention of addiction, consumer protection and combating criminality and illegality. However, the manner in which these objectives are given effect is subject to reform as will be outlined below. Moreover, the letter of March 2011 notes how Dutch citizens should be able to partake in gambling in a safe and responsible manner, which includes an appropriate and attractive offer incorporating online gaming. Furthermore, as part of the coalition agreement it was decided that increased revenues would be directed from lotteries for sport and, secondly, that licences for online gaming and lotteries will bring in additional revenues of €10 million from 2012 onwards.

Importantly, there will be a shift away from the offline sector monopolies towards competition between operators functioning on the basis of licences awarded in a consistent, transparent and non-discriminatory manner. Not only does the State Secretary seek to comply with the Betfair decision, but also explicitly with Markus Stoss (Case C-316/07) and Carmen Media (Case C-46/08) through ensuring that there is horizontal consistency across the entire national market.

It is the intention of the current government that licences for online gaming are available for a broader range of gaming services than merely poker, as was suggested by the aforementioned report on the ‘Legalization of Online Betting and Gambling’. The government foresees that the Netherlands will look towards international standards in relation to various aspects, including protecting vulnerable players, the fairness of games offered and responsible marketing. Other aspects include removing the monopoly of Holland Casino on the provision of land-based poker for small-scale tournaments and adjusting the regulatory regime applicable to slot machines and amusement arcades.

One success of the previous government was the passage of legislation establishing a Gaming Authority (Kansspelautoriteit), which should be operational as of January 1, 2012. Under the current proposals, the remit of this independent authority will be extended so as to include the awarding of licences for online gaming, the supervision of online operators and the application of enforcement measures as appropriate, including both administrative and criminal law measures. Currently, the national market is regulated directly by the Ministry of Justice and other ministries according to the monopoly in question and the

national Gaming Control Board (College van Toezicht op de Kansspelen) which is limited to providing advice to the government and is generally regarded as a ‘toothless tiger’.

Two general consultations within the lower house have followed this letter (on April 13 and June 1, 2011). At the end of May, a series of roundtable discussions was organised so that various stakeholders could exchange their views with MPs regarding the proposed reforms. It remains to be seen to what extent the State Secretary will be able to overcome the doubts and resistance amongst MPs. Whilst many appreciate the need to reform the existing legislation and to provide for a domestically regulated supply of online gaming services, considerable concern has been aired with regards to the ability of the charitable lotteries to continue to generate revenue in the new environment and to address the prevention of addiction and misleading advertising practices, although this latter concern stems from regulatory failure within the current regime. Specifically related to the online market, resistance focuses on whether operators who currently supply Dutch residents should be eligible for a licence in the future, whether incumbent operators should be given a preferential position within licence award procedures and whether online operators would be obliged to establish themselves in the Netherlands.

Concurrently, the consultation period for the European Commission's Green Paper on Online Gambling in the Internal Market is open; a process seen as a threat by some MPs yet also as an oracle from which solutions can be expected by others. The Dutch government has already responded to the consultation, with parliamentary discussions regarding the document having taken place on June 23, 2011 (the outcome of which is unknown at the time of writing).

Should all go to plan, then the Gaming Authority will be operational on January 1, 2012, and will be awarding licences for online gaming later that year. During 2015, the licensing procedure for the offline market will come into force. ■

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