



The briefing: Netherlands update



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Justin Franssen, partner at Kalff Katz & Franssen, and Younes Moussaoui, associate at Kalff Katz & Franssen, look back on a landmark year for i-gaming in the Netherlands – and ahead to another important 12 months

T HERE were many key developments involving remote gaming in the Netherlands in 2013 - and more groundbreaking events are expected in 2014.

Last year, the Dutch gaming authority showed its teeth for the first time and the draft remote gaming bill gave insight into the future framework of remote gaming in the Netherlands.

The next 12 months will be crucial for the regulation of remote gaming since the final version of the remote gaming proposals are due to be discussed in parliament. Furthermore, plans to privatise Holland Casino will be revealed and the lottery licensing system will be overhauled.

Enforcement

The gaming authority introduced its enforcement policy against remote gaming operators in the summer of 2012. The policy is based on prioritisation and entails that the gaming authority – in principle – will not enforce the Betting and Gaming Act against operators that remain “passively available” on the Dutch market up until licences become available.

The authority publically stated that it will focus its enforcement activities towards operators that operate a remote gaming website (i) in the Dutch language, (ii) with a .nl extension in the top-level domain, or (iii) conduct radio, television or print media advertising directed at the Netherlands. The vast majority of remote gaming operators adjusted their offering in the course of 2012 to ensure compliance with these criteria. Such operators currently face extremely minimal enforcement risks even though offering remote gaming into the Netherlands remains illegal.

Compliance by the vast majority of the industry with the above mentioned criteria resulted in little enforcement activities from the gaming authority, or so it seemed. Last year, the gaming authority provided a glimpse of the actions it takes in practice to enforce the BGA. These actions can be divided in (i) enforcement actions taken directly against remote gaming operators and (ii) other actions taken to thwart the offering of remote gaming via agreements with service providers.

September 2013 was the first time the gaming authority used its administrative enforcement measures against a remote gaming operator by imposing a fine of €100,000. The operator met at least one of the three enforcement criteria. The full effect of such sanction decision remains unknown.

It remains unclear to what extent a sanction decision will have an impact on a probity test in a future licence application, especially in light of statements of the gaming authority that enforcement measures *may* lead to an unsuccessful future licence application. No other sanction decisions against remote gaming operators have been published to date although a few more cases are pending and will most likely be published in the first months of 2014.

In addition to direct enforcement measures against remote gaming operators, the gaming authority also focussed its attention on service providers. This attention resulted in several (pending) covenants between the gaming authority and television broadcasters, social media companies, financial institutions and advertising companies.

The (intended) covenants have a common objective: companies that become signatories to such a covenant undertake to refrain from commercial cooperation with remote gaming operators. It remains somewhat unclear how this “indirect” enforcement relates to operators who fully comply with the prioritisation criteria but there are indications the gaming authority intends to target in principle only those companies that demonstrate lack of compliance with the current toleration policy.

To date, the gaming authority concluded agreements with Hyves (a Dutch social media company) and Facebook. The gaming authority further aims to conclude covenants with broadcasters, financial institutions and marketing platforms.

Regulation of remote gaming

Last year was also marked by the draft remote gaming bill, which was published for public consultation in May 2013. The bill aims to introduce a regulatory framework to enable remote gaming licences to become available in 2015. Despite the lack of technical details, both the draft remote gaming bill and the explanatory memorandum provide good insight into the overall direction of the new legislation.

Based on the draft remote gaming bill and the explanatory memorandum, it appears that the upcoming regulatory regime aims to introduce a remote gaming tax rate of 20 per cent GGR and the number of licences available are in principle unlimited. Additionally, there will be few restrictions on the type of gaming that will be allowed and international liquidity will be accepted. Furthermore, no physical establishment or land-based gaming activity of gaming operators will be required in order to be eligible for a remote licence.

Despite these and other rather positive elements of the draft remote gaming bill, there are certain elements that have raised concerns during the consultation period. For example, the ministry stated in the explanatory memorandum it aims to “channelise” at least 75 per cent of the current demand for remote gaming to locally regulated offering.

Local and international stakeholders alike criticised this approach since it entails that 25 per cent of the Dutch consumers will continue to play with locally unregulated operators. It is highly questionable whether the ministry will reach its somewhat unambitious target. Experience in other markets clearly demonstrates that successful regulation heavily depends on the overall costs for operators.

The legislation unfortunately aims to introduce various additional costs

over and above the 20 per cent GGR tax rate. H2 Gambling Capital estimates that all costs combined result in an effective tax burden of at least 24 per cent and would lead to a level of channelisation of just 67 per cent. It should be noted that further costs that stem from secondary regulation have not (yet) been factored in by H2 Gambling Capital.

In the months after the consultation process, the ministry digested some 90 consultation submissions and revised the draft remote gaming bill where it deemed necessary. The revised and final version of the remote gaming bill is expected to be discussed by the Council of Ministers (*Ministerraad*) in early 2014 and will be sent for advice to the Council of State after approval by the Council of Ministers. The Council of State usually needs two or three months to prepare its advice.

The remote gaming bill will then be sent to parliament following the advice of the Council of State. The ministry expects the bill to be discussed by the House of Representatives before the summer and approved by the senate after the summer of 2014. After adoption by the senate, the bill can be published and enters into force shortly after, at which state the gaming authority will finally have the legal basis to award remote gaming licences. Based on the aforementioned process it is expected that, without any further delay, remote gaming licences will become available in the course of 2015.

Secondary legislation

The ministry is currently focussing its attention on drafting the secondary legislation. The ministry deals with five key areas in the secondary legislation and the process of developing the draft secondary legislation is supposed to be finalised in the first half of 2014. These five key areas are: (i) responsible gaming, (ii) technical requirements, (iii) management requirements/operations and processes, (iv) types of games and characteristics, and (v) formal aspects of the application process and licensing process.

The ministry stated in the summer of 2013 that it would value the input of the industry in the process of developing secondary legislation. A number of stakeholders selected by the ministry attended several workshops organised by the ministry in order to obtain such input. With regards to the other three areas, it is expected that the ministry will contact several stakeholders on an ad hoc basis.

Additionally, a meeting with key industry stakeholders is due to be scheduled in April 2014 to discuss the lower regulation in its entirety before another public consultation process will commence. The public consultation process is expected to start before the summer of 2014 and a final version of the secondary regulation will most likely be sent to the Council of State by the end of the summer of 2014.

Lottery reform and Holland Casino privatisation

In addition to the legislative steps with regards to the regulation of remote gaming, it is also expected that plans of the ministry with regards to a reform of the lottery market and the privatisation of Holland Casino will be unveiled.

Reforming the lottery market is deemed necessary following the groundbreaking decision of the Council of State in the 2011 Betfair case. In essence, the Council of State ruled that the current licence allocation procedure in the Netherlands is in breach with EU law. All current semi-permanent lottery licences expire on December 31, 2014, and a transparent allocation procedure should therefore be put in place well before that time.

The government also clearly announced its ambitions in the government coalition agreement of October 2012 by expressly stating: *"As of 2015, licences for lotteries will no longer be awarded in an under hand procedure, but through a transparent procedure, such as for example an auction or a beauty contest."*

It is anticipated that the ministry will provide its plans concerning the lottery market to the Council of Ministers together with the revised remote gaming bill at the end of January 2014.

The government further announced in its coalition agreement that Holland Casino will be privatised subject to conditions as it takes the view that supplying gaming activities is not a core task of the government.

The plans with regards to the privatisation of Holland Casino were initially expected after the summer of 2013, however this timeline has unfortunately not been met. It is therefore still unclear when Holland Casino will be privatised and how this will take shape. It is expected that the ministry will shed some light on precise plans concerning Holland Casino in the course of 2014.

Overall, many key developments are expected in 2014 that will drastically alter the face of the gaming industry in the Netherlands.

