
Revised Dutch remote gaming bill notified to Brussels ahead of parliamentary process

By **Frank Tolboom** and **Dr Alan Littler**, Kalff Katz & Franssen attorneys at law, Amsterdam, The Netherlands



Frank Tolboom



Dr Alan Littler

Sooner than expected the Dutch government notified, on 5 March 2014, a revised version of the remote gaming bill (“notified bill”) to the European Commission (“EC”). The standstill period ends on 6 June 2014, although given the legislative process ahead the bill will not be adopted before this date anyway. It is expected that the bill will enter into the political arena in The Hague just before the summer and plenary debates will follow later this year or even in the beginning of next year.

At the time of writing the EC has not made an English translation available of the 170+ page bill and the accompanying explanatory memorandum. Therefore, this article will set out some of the key features and changes as incorporated by the Ministry of Security and Justice (“Ministry”) following the consultation period which resulted in almost 90 submissions from various stakeholders. On a final note, we will have a look into our crystal ball and discuss next steps, including an estimated legislative timetable until licensing commences.

Background

Although the Netherlands tends to be quite liberal in certain areas such as its soft drugs policy and strives to be the frontrunner in Europe in other areas such as innovation, technology and digitalisation, it is one of the last boys in class when it comes to regulating remote gaming.

Currently, legislation, the *Wet op de kansspelen* (Betting and Gaming Act, “Act”), which dates back to 1964, maintains a ‘prohibited unless licensed’ approach to all forms of gaming, subject to some minor exceptions, and at present there is still no legal basis for remote gaming licences to be awarded by the Gaming Authority (“*Kansspelautoriteit*”). Therefore there is no true remote gaming offering available in the Netherlands which is lawful under Dutch law.

The current government is finally driving the introduction of a remote gaming licensing regime

and in May 2013 the Ministry, along with colleagues in Finance, published a draft bill for consultation (“consultation text”). It is important to note that the bill does not seek to introduce a new law to repeal and replace the existing Act but rather to amend it so that remote gaming can be regulated and licensed in the Netherlands, as of 2015. The bill will also introduce changes to the Betting and Gaming Tax Act. The bill will introduce a regulatory framework with many details being fleshed out in forthcoming secondary legislation.

In the months after the consultation process, the Ministry digested some 90 consultation submissions from various stakeholders and revised the draft bill where it deemed necessary. We will discuss these changes below.

The revised version of the bill was approved by the Council of Ministers (“*Ministersraad*”) on 14 February 2014 and subsequently has been sent to the advisory body of the government, the Council of State (“*Raad van State*”), to be reviewed. Once the Council of State has delivered its advice, the bill may be amended again and subsequently, with the accompanying advice, will then go to the House of Representatives (“*Tweede Kamer*”). The Ministry already took a procedural hurdle through notifying the bill to the EC on 5 March 2014; at this stage the notified bill entered into the public domain.

In the transitional period until regulation and licensing the Gaming Authority has publically stated that it is prioritising its enforcement efforts. The Gaming Authority is focussing on operators who are crossing the so-called three “red lines” and seeks to take enforcement measures against entities offering remote gaming in the Netherlands where they: i) offer remote gaming via a website in the Dutch language; and/or ii) offer remote gaming via a website using a .nl extension, and/or; iii) advertise their services via radio, television or print media advertising directed towards the Netherlands. Further to pressure from incumbent operators and increased political scrutiny on whether this policy should not just be perceived as a policy of

tolerating unlawful behaviour – an approach used in law enforcement regarding other forms of public policy – the State Secretary responded to parliamentary questions in February 2014. The response indicated that for operators who are compliant with the above mentioned criteria it “does not mean that these operators by definition are exempt from enforcement action”.

Notified bill

General observations

Although the Dutch government claims that the proposed regulatory framework will implement a “Dutch model” it must be noted that the bill is heavily inspired by the Danish legislation. Consumer demand is central and a key driver behind the new regime will be the channelling of existing demand into the locally licensed suitable and attractive offer. This is the so-called channelization objective, which underpins the objective of consumer protection. Unchanged is the introduction of a B2C licensing regime (although the Gaming Authority could issue “binding instructions” to B2B providers), and this regime will not be ring-fenced, at least for exchange betting and poker (international liquidity). No cap on the amount of licenses is provided for.

The legal offer has to be so attractive that players feel no need to use the sites of illegal operators, according to the explanatory memorandum. Initially the objective was to capture 75% of the market by locally licensed operators but both local and international operators, and also the Gaming Authority, criticized this approach for lacking ambition and entailing that the government seemed to resign itself to 25% of the market remaining in the hands of locally unlicensed operators. In the notified bill and further to a new report of H2GC the Ministry decided to increase the channelization rate to 80% without changing the tax rate of 20% on GGR, whilst referring to Denmark where currently 90% of the market is captured by the locally licensed offering. A fair question would be why the Dutch government does not strive for maximum channelization and lower the level of taxation. Obviously financial motives play an important role beneath the surface of the bill.

Another change with regards to the central objective of the bill is that, compared

to the consultation text, the aim of the notified bill is to regulate only the current demand, not to create new and/or additional demand for remote gaming. This is being used as an argument for the exclusion of event betting from the bill and rejecting calls for a “lighter” regime for interactive games via TV and magazines as was proposed by media companies in the Netherlands.

Server and other localisation requirements

Another cause for concern within the remote sector was that according to the consultation text licensees would be required to locate their server in the Netherlands, in the absence of a Memorandum of Understanding (MOU) between the Gaming Authority and the relevant EU/EEA regulator this server requirement would prevail. Obviously, this requirement would not only be very costly but also raises concerns in terms of EU law. Furthermore, practice in other Member States illustrates that for effective supervision it is unnecessary to have the server located in the Member State where a game is offered. The notified bill notes that the Gaming Authority consulted other regulators and confirmed that a local server in the Netherlands is not necessary for effective supervision. Therefore the Ministry has removed the server requirement from the notified bill. Operators are allowed to have their primary gaming server in an EU/EEA jurisdiction, or another jurisdiction (reference is made to Alderney and the Isle of Man) if exemption is provided in relation to that jurisdiction, subject to conditions, by the Gaming Authority.

Unchanged is the requirement for an operator to have a control databank located in the Netherlands which local authorities (such as the tax authorities) can access for supervisory purposes. Despite political demands the absence of a requirement for operators to have a land-based operation, or to be head-quartered, in the Netherlands as a licensing condition is also maintained. Applicants must be established in the EU/EEA, or another appointed jurisdiction, to be eligible for a license.

Taxation & Other costs

During the consultation period one of the most disputed elements was the proposed

differential tax rate between remote gaming (20% GGR) and land-based gaming (29% GGR). In summary, most of the incumbent operators called for the same tax rate to apply to land-based and remote gaming, arguing that a differential tax rate would lead to i.) a distortion of competition, ii.) demarcation problems in relation to the exact distinction between remote games and other games, and iii.) unjustified state aid.

In the current version of the bill the Ministry admitted that a uniform tax rate would have some advantages but stressed that a differential tax rate is necessary in order to achieve the channelization objective and therefore they upheld the differential tax rate. A uniform tax rate of 20% GGR would have caused a budget deficit of €145 million per year. Furthermore, the Ministry rebutted the arguments of the incumbents as i.) any distortion of competition due to a differential tax rate is negligible as the pay-out ratios of remote operators is not dependent on the level of taxation (either 20% or 29%) and is usually similar in various Member States irrespective of their level of taxation, ii.) the explanatory memorandum provides further clarity when a game will be considered as offered remotely and taxed at 20% or, alternatively, is considered as land-based gaming and taxed at 29%, (further details on this will be covered by secondary legislation). and iii.) the differential tax rate will only apply once approved by the EC. The Ministry added that according to research of H2GC eight other jurisdictions apply differential tax rates between remote gaming and land-based gaming and presumably that the proposed differential tax rate is also “workable and tenable” in the Netherlands.

Although the remote sector by and large found the headline rate of 20% GGR to be acceptable, concerns arose in relation to the effective overall rate, estimated at 25-27% GGR. Discontent lies with the definition of the taxable base; bonuses are not deductible. Furthermore additional levies, fees and a contribution to an addiction fund and possibly a contribution to sports and charities will apply, some of which will be set out in secondary legislation. Thus the burden remote operators will shoulder is currently unclear. Despite the concerns raised by the remote sector and although the Ministry has increased the channelization objective



from 75% to 80%, the notified bill contains no changes with regards to fees, levies and contributions. Quite remarkably the Ministry presented new reports from H2GC which lead to different conclusions than previously with respect to the anticipated level of channelization and expected revenues for coming years. The Ministry concluded that the combination of the tax rate of 20% on GGR and the channelization objective of 80% is “a realistic estimate of what’s possible”.

Practice will show if the aforementioned will indeed be the case and if the Netherlands does not end up in a similar situation to France.

Product scope

A subtle change is made in the bill with regards to the channels on which games are permitted to be offered. The notified bill indicates that the primary focus is on Internet offering. Admissibility of other channels (TV, smartphones) will be covered by secondary legislation. Another subtle change is that contrary to the consultation text the gaming offers are divided into two broad categories i.) player vs. player (poker and exchange betting are mentioned) and ii.) player vs. operator (casino games and fixed odds betting are mentioned). Live-betting on sports is referred to as “have a strong addictive nature, which makes regulation necessary”. So in general terms casino games, poker and betting on sports will be regulated. Event betting, spread betting and online lotteries remain excluded. Further details with regards to types of games will be left to secondary legislation.

However, somewhat less subtle and catching the remote gaming sector by surprise is that remote bingo has been excluded from the notified bill. Whereas bingo in the consultation text was categorised as a casino game, the notified bill qualifies it as a lottery product. The explanatory memorandum provides a brief explanation arguing that in practice the label “bingo” is often used for different games which are very similar to lottery products and currently the lottery products offered by the Vriendenloterij (“Friendslottery”: part of Novamedia consortium). So it would seem that lobby efforts by the incumbent charity lotteries have paid off so far. The explanatory memorandum continues and states that “As lotteries, as mentioned before, will not be covered by the regulation of remote gaming, such bingo forms are not permitted to be offered under a remote gaming license”. This implies there is no outright ban for remote bingo and there might be still room for other forms of bingo. Furthermore, the explanatory memorandum notes that the demarcation between lottery games and games which can be offered remotely, will be detailed in secondary legislation.

Substitution and “Level Playing Field”

During the consultation process and various other occasions incumbent operators (and their beneficiaries) stressed that the regulation of remote gaming would lead to a substantial decrease in the contribution to charities and sport. The notified bill reiterates the importance of such contributions. However, according to the notified bill these contributions will not be endangered by

the introduction of a regulatory framework for remote gaming. On the contrary, these contributions could increase as incumbent operators will have the opportunity to expand their offer, thereby complimenting their existing offline offer(s).

Incumbent operators have also called for a “level playing field” to counter a perceived competitive disadvantage upon market opening in comparison with remote gaming operators already active on the market. The notified bill clearly rejected calls for a “pre-launch” or a “head start” as according to the notified bill a “level playing field” entails that similar rules apply to all licence applicants. This notion does not mean that operators (remote and incumbents) should have a similar starting position or market share. At the same time, the Dutch government is of the opinion that in relation to the enforcement policy during the transitional phase the existing prioritisation criteria must be tightened. The explanatory memorandum also notes that the Gaming Authority will clearly communicate that operators who “persist in providing games of chance targeting the Netherlands” will be disqualified from a future licence. Although the aforementioned is not further specified it would seem that the notion “operators persisting in targeting the Netherlands” refers to operators who (continue to) breach the prioritisation criteria.

Enforcement

Starting point for the enforcement policy in the newly regulated regime remains the objective of channelling as many players as possible to the locally licensed offer. Obviously it is not possible to wholly eradicate



the “black market” and therefore the notified bill notes that life for illegal operators should be made as difficult as possible. However, the notified bill acknowledges that administrative sanctions are not effective towards foreign based entities.

Therefore, additional measures are introduced such as the possibility for the regulator to participate in the game anonymously in order to retrieve the identity of the locally unlicensed operator. Furthermore, the Gaming Authority could issue binding instructions to internet service providers (ISPs) and payment service providers (PSPs) with the request to stop doing business with locally unlicensed operators. The Gaming Authority will maintain and distribute a black list of operators for such purposes. Following criticism from organisations representing ISPs, as put forward in their consultation submission, the notified bill made these binding instructions for ISPs conditional upon prior approval by a court magistrate (“rechter-commissaris”). The notified bill also clarified that binding instructions will only be used if and when there are no less onerous means available to the achieve the aim (proportionality and suitability-test).

Next steps and legislative timetable

We expect that – ceteris paribus - the parliamentary process will probably run until Q1 or Q2 of 2015. Although notification to the EC indicates that the Dutch government is speeding up the process with a view to having remote gaming licenses available in 2015 our feeling is that this may not happen until Q1 2016.

In the meantime the Ministry is currently working on the secondary legislation dealing with five key areas: 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 licencing 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 covering responsible gaming and technical standards in order to provide 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 anticipated for April/May 2014 to discuss the lower regulation in its entirety before another public consultation process commences prior to the summer of 2014.

Concluding remarks

Although the bill has been notified earlier than expected, the legislative process has just started and it is far from nearing the end game. The notified bill is most likely not the final version and could be subject to many changes going forward. Indeed the need for re-notification to the EC cannot be excluded.

First of all the bill could be amended upon advice from the Council of State before it is sent to the Dutch parliament - for instance with regards to privacy law concerns regarding the central register for excluded players. Although the advice of the Council of State is non-binding it cannot be easily

disregarded by the Ministry. Furthermore, it remains to be seen how the EC will respond to the bill. Finally, it will not be easy for the government to guide this bill through parliament. The position of the current coalition government (labour party “PvDA” and conservative-liberal party “VVD”) is somewhat weakened and less stable due to a substantial loss in local elections in March 2014, especially for the PvDA. Furthermore, the government does not have a majority in the upper house of parliament, the Senate. Therefore, it is not inconceivable that motions and/or amendments will be tabled by MPs in the House of Representatives and that the government has to give some form of leeway to demands of the opposition.

In the shadow of the primary bill, the Ministry is working on secondary legislation which in our opinion will be much more important for the sector as the primary bill merely provides sketches the outline of the regulatory framework. Since the devil is in the detail the secondary legislation will ultimately determine whether the forthcoming Dutch regulatory framework will be sound, attractive and viable.

FRANK TOLBOOM and **DR ALAN LITTLER** are both gaming lawyers at Kalff Katz & Franssen Attorneys at Law, where they work in the gaming practice group headed by partner Justin Franssen. The practice advises and litigates on behalf of the international gaming sector in the Netherlands.