

# DUTCH IGAMING BILL: THE THIRD VERSION

The third version of the Dutch remote gaming bill and critical Council of State advice were submitted to Parliament in late July. **Younes Moussaoui** and **Justin Franssen** of Kalf Katz & Franssen provide an update and analysis for iGaming Business.

On 22 July 2014, the third version of the remote gaming bill, accompanied by very critical advice of the Council of State and the response of the State Secretary to this advice, were submitted to Parliament. The bill has been slightly adjusted in comparison to the second version of the bill published in March 2014. However, the State Secretary did not feel the need to amend several points considered by the Council of State in its review of the bill. Some of these points concern the incompatibility of the bill with EU law, which will potentially play a significant role during the upcoming debates in Parliament.

## Background

As discussed in our earlier article 'Dutch iGaming: a glimpse into the future' published in issue 86, the government is looking to introduce a regulatory regime for remote gaming in 2015. The Ministry of Security & Justice ("Ministry") and the Ministry of Finance published a first draft bill for public consultation ("first version of the bill") in May 2013. The first version of the bill was amended following the public consultation ("second version of the bill"). Subsequently, the second version of the bill was sent to the Council

of State for advice in February 2014, and notified to the European Commission on 5 March 2014.

The Council of State delivered its advice to the Ministry on 7 May 2014, which has led to a revised version of the bill ("third version of the bill"). The third version

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of the bill was sent to Parliament on 22 July 2014 accompanied with the Council of State advice and the response of the State Secretary to this advice. The overall conclusion of the Council of State advice is remarkable: the government should "re-consider whether the proposed bill is better than the alternative, i.e. a ban on remote gaming whilst having limited enforcement measures".

## Remote gaming bill

The third version of the bill was slightly amended in comparison to the second version of the bill. Most amendments concern further explanation of several aspects of the bill, such as the expansion of powers of the Gaming Authority. There

are however some material amendments which will please the remote gaming sector.

### • Remote bingo

The most remarkable amendment in the second version of the bill was without a doubt the exclusion of remote bingo. The first version of the bill contained an exclusion of remote lottery products. This was proposed due to an alleged lack of 'consumer demand' for remote lottery games. The Ministry took the position that

"some forms of bingo are very similar to games which resemble lotteries", and such forms of bingo were to share the same fate as remote lottery products; they were to be excluded from the bill. This wording left leeway for the regulation of forms of bingo which do not resemble lottery products. The second version of the bill however remained silent with regards to this possibility.

This silence is broken in the third version of the bill. The bill currently distinguishes "short odd" (i.e. short time between placing a stake and the outcome of the game) bingo games, which are considered casino games, from "long odd" (i.e. long time between placing a stake and outcome of the game) bingo games, which are considered lottery

games. The former will be regulated under the remote gaming bill, the latter remains excluded. This distinction begs the question: what is the required amount of time between placing a stake and the outcome of the game for a bingo product to be considered a “short odd” game? The bill unfortunately does not provide a clear demarcation between these two forms of bingo. Secondary legislation will most likely shed light on this matter.

#### • Costs of operation

The third version of the bill provides further information with regards to the costs of operation for remote gaming operators. The proposed differential gaming tax rate of 20% GGR for remote and 29% for terrestrial gaming remains, despite some heavy opposition from the Labour Party, amongst others. The initially proposed annual exploitation fee which operators were supposed to pay to the Ministry has been removed. Other additional annual costs, such as the gaming levy and the contribution to the anti-addiction fund, have been clarified.

The gaming levy is set at 1.5% GGR and the contribution to the anti-addiction fund is set at 0.5% GGR. Several stakeholders stated during the public consultation round that the levy should be based on the actual costs, and not on a percentage of the GGR. The Ministry has apparently taken this concern partly to heart, and stated in the third version of the bill that the levy and fee will not exceed the actual costs incurred by the Gaming Authority and the anti-addiction fund. The Ministry will re-assess each year whether the revenues generated correspond to the costs incurred in the previous year by the Gaming Authority and the anti-addiction fund, i.e. whether there is a surplus or a

shortage. The levy and fee for the following year will be adjusted accordingly, i.e. reduced if there was a surplus and raised if there was a shortage.

#### Council of State advice

In its extensive advice, the Council of State expressed concern regarding several aspects of the bill. These aspects concern inter alia: i) the potential lack of effectiveness and enforceability of the bill, ii) the potential lack of horizontal consistency of the gaming policy, iii) whether (a portion of) the costs of the Gaming Authority should be covered by

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public funds, iv) justifications provided for the proposed active duty of care, and v) the proposed differential gaming tax rate. The Council of State came to the remarkable conclusion that the government should reconsider the regulation of remote gaming. We will further focus on two of the five aforementioned aspects.

#### Principle of horizontal consistency

It follows from EU case law that the gaming policy pursued by Member States has to be horizontally consistent. The Court of Justice of the European Union considers it to be inconsistent if a Member State, on the one hand, subjects certain games to a very restrictive policy while, on the other hand, subjects other types

of games that pose more risk to the given legal objective to a less restrictive policy. Horizontally inconsistent gaming policies are incompatible with EU law.

Bearing the aforementioned in mind, the Council of State rightfully doubts whether the choice for an open licensing regime for remote games whilst (for the time being) maintaining a monopoly for terrestrial casinos and prohibiting online lottery products, results in a horizontally consistent policy. The pursued legal objectives of the Dutch gaming policy is the protection of consumers, prevention of gambling addiction and the prevention

of crime. The bill proposes competition in the remote gaming market, including the remote casino and remote sports betting markets, whilst prohibiting remote lottery products. The latter clearly poses a smaller risk for one of the pursued legal objectives, i.e. gambling addiction, in comparison to the former.

The State Secretary disagrees with the Council of State because he inter alia takes the position that remote lottery products are less risky, and it would therefore be “disproportionate” to impose the very strict conditions proposed in the bill to this vertical. This line of reasoning does not make sense to us. Surely the government could choose to regulate online lotteries whilst imposing less strict conditions

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for such games. The reasoning for the exclusion of online lotteries from the bill is clearly the commercial protection of the lottery licensees.

#### **Active duty of care**

The bill proposes an active duty of care for operators as a measure to prevent gambling addiction. This active duty of care entails, in short, that operators should inform the players concerning the (risks of the) offered products, monitor their gaming behaviour and, where necessary, intervene to prevent a player developing risky gaming behaviour. The Council of State notices that the proposed active duty of care stretches further than the duty of care in other jurisdictions whilst no justification is provided for this far-reaching duty of care. Additionally, no information is included in the bill regarding the experiences in other jurisdictions with regards to the prevention of gambling addiction. It is therefore not clear to the Council of State whether the prevention policy in other jurisdictions is effective or not, nor whether the proposed active duty of care is more effective and therefore necessary.

The principle of proportionality entails that restrictions to the freedom to provide services have to be suitable and must not go beyond what is necessary to achieve the identified objective. It follows from EU case law that Member States bear the burden of proof for any restrictive measure. The aforementioned entails that the Dutch government has to explain why it is necessary to impose an active duty

of care and substantiate this explanation with evidence. The proposed duty of care could be considered as disproportionate, and therefore incompatible with EU law, if the Dutch government fails to adequately substantiate its choices.

The State Secretary does not discuss the justification of the active duty of care in detail. He acknowledges that the proposed duty of care stretches further than the duty of care in other jurisdictions, but states that the Netherlands is allowed to choose its desired level of protection and the government chose the highest possible level. The anti-gambling addiction measures in other jurisdictions did not satisfy the high level of protection pursued by the government, according to the State Secretary.

#### **Next steps**

The Ministry is currently working on secondary legislation which it intends to publish for public consultation in October 2014. The Ministry initially aimed for 1 January 2015 as the date on which the remote gaming bill will enter into force. It is currently expected that Parliament will start discussing the bill in September 2014, and the voting in Parliament will likely take place in April 2015. Amendments to the bill are expected in this process. Subsequently, the Senate will discuss the bill in Q2 2015. The Senate cannot request for amendments, it can only accept or reject a bill. Once adopted, the bill will be published in the Official Gazette and can then enter into force (possibly at a later

date). This process results – ceteris paribus – in remote gaming licenses most likely not being awarded before Q1 2016.

The Ministry did not follow the advice of the Council of State (re-considering the regulation of remote gaming) and has submitted the bill to Parliament. The aforementioned has no legal consequences since this advice is non-binding. However, not following the advice could have political consequences. The Council of State advice offers sufficient ammunition for opponents as well as advocates of the regulation of remote gaming, which can be used during the parliamentary process. Additionally, the Senate is known for attaching great value to advice of the Council of State. It therefore remains to be seen what the bill will look like after it survives the political arena, if it succeeds to do so...

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