

OPENING UP THE GAMING MARKET IN THE NETHERLANDS?

By Justin Franssen and Frank Tolboom



Things are currently moving rapidly in the Dutch gaming market due to both political and legal developments. The new Dutch government indicated that it might introduce a licensing regime for remote gambling, and very recently a sell-off of state-owned Holland Casino was suggested by the state secretary of finance in Parliament. In addition, legal cases are pending regarding the compatibility of the Dutch gaming policy with EU law and the qualification of poker as a game of chance or skill.

Current Legal Framework

The legal basis of the Dutch gaming policy can be found in the Dutch Betting and Gaming Act of 1964 ("Gaming Act"). The Gaming Act stipulates that offering games of chance or promoting games of chance without a license is prohibited. It also includes an enumeration of the specific games for which a license can be granted. The Gaming Act allows for exclusive licenses for a state lottery, good causes' lotteries, instant lotteries, sports betting, lotto, horse betting and casinos (including offline poker). Holland Casino is the exclusive licensee for casino gambling, while De Lotto holds the exclusive right for sports betting, instant lotteries (scratch cards) and the lotto. Currently, the only types of licenses available are those expressly stated in the Gaming Act and no remote gambling licenses are available. Therefore, currently there is a total ban on online gaming. Nevertheless, various incumbent operators are allowed to offer their services online, which is not perceived as online gaming but rather "e-commerce." E-commerce is defined as an offline game of chance for which the Internet is used as an alternative distribution channel. Online gaming or "e-gaming," on the other hand, is defined as a game of chance that is solely offered online. Thus, in the current situation, e-gaming is prohibited whereas e-commerce is allowed. In our opinion, the difference between e-commerce and e-gaming is highly questionable, as there seems to be no legal basis for such a distinction in the Gaming Act.

There are both legal and political developments that have increased the feasibility of opening up the Dutch gaming market.

Political Developments

Regulation of Online Gaming

In 2009, the former Ministry of Justice installed an advisory committee, Committee Jansen, to advise on the feasibility of regulating the online gaming market. The Jansen Committee published its report in July 2010, and it basically advises regulating the market for just online poker. The committee does not envision a complete liberalization, but rather it recommends a regime in which several parties would be awarded a temporary license. Such a license would be eligible to be renewed (or, conversely, awarded to other parties) after a specific period of time.

Since October 2010, there has been a new Dutch right-wing minority government in place, consisting of the VVD party (Conservatives) and the CDA party (Christian-Democrats) backed by Geert Wilders' PVV (Freedom Party). This has created a completely new political landscape. The post of minister of safety and justice (formerly the ministry of justice) has been filled from the ranks of the Conservative party VVD, namely by Ivo Opstelten. Furthermore, Fred Teeven (also a VVD member) is the new state secretary of safety, and Justice Teeven handles the gaming and gambling dossier. It must be noted that Teeven is publicly supporting regulation of the remote gaming sector and is known to be an avid poker player.

Most important, it seems that the new government plans to introduce a licensing system for online gaming in 2012. The financial paragraph of the new coalition agreement states, literally: "Introduction of license fee for (or auction of) licenses for the exploitation of Internet gambling and lotteries."

It is therefore plausible that the policy on (remote) games of chance will be thoroughly reviewed in favor of a multiple licensing system. No decision has yet been made by the Dutch government with respect to the regulation of online games of chance. As of this writing, the secretary of safety justice intends to submit a policy to the House of Representatives in March 2011, presenting the outlines for policy perceptions on games of chance.

Holland Casino: Privatization?

The activities of state-owned operator Holland Casino were strongly attacked in Parliament last year. Because of the economic downturn, Holland Casino presented an investment plan of "hundreds of millions of euros," which included organizing theater performances and club activities. The plans have been declined by the former minister of safety and justice. Additionally, the political parties questioned the compliance of Holland Casino regarding the conditions to combat gambling addiction, fraud and other illegal practices. Furthermore, there is a lack of monitoring of Holland Casino. At the end of 2009, the Labour and Conservative parties brought up for discussion a possible privatization of Holland Casino. Strikingly, MP Teeven filed a parliamentary motion on the sale of Holland Casino. (As mentioned above, Teeven is now responsible for the gaming sector.) However, his predecessor responded by stating that, with reference to the ECJ case *bwin v. Santa Casa*, a state monopoly is very well in accordance with EU law. Therefore, he rejected the proposal to privatize Holland Casino.

However, since the introduction of the new government, talks about privatization have re-commenced. In a Parliamentary debate on Jan. 26, 2011, State Secretary of Finance Frans Weekers (a VVD member) announced that the government is examining the possibilities of privatizing state-owned Holland Casino and granting multiple concessions for the offering of casinos. Weekers suggested that a system of concessions for casinos might safeguard public interests (preventing gambling addiction and combating fraud and criminality) even better, since these principles would form part of the strict conditions for the award of a concession and because the

authorities would be entitled to revoke the concession if a private casino didn't meet these strict conditions. The state secretary of finance emphasized that no decision yet has been made, but that he will enter into discussions with the state secretary of safety and justice. Although the statement of the state secretary of finance is preliminary, it can be seen as an indication that the Dutch administration is considering liberalizing its strict policy on gaming.

Legal Developments

Dissenting Poker Judgments

So far, poker has been considered a game of chance and, therefore, tournaments and cash games have always been exclusively organized by the monopoly Holland Casino.

However, on July 2, 2010, the District Court in The Hague ruled that poker cannot be classified as a game of chance and thereby acquitted the organizer of an offline poker tournament that had been charged with violating the Gaming Act. The court argued at length as to why poker cannot be classified as a game of chance. This judgment is contrary to a ruling rendered by the Supreme Court in 1998, and the District Court also found that the evidence used in that ruling was scientifically insufficient. The judgment is not yet final, pending the outcome of the appeal lodged by the public prosecutor.

Meanwhile, on Oct. 14, 2010, the District Court in First Instance in Leeuwarden ruled—contrary to the decision mentioned above and in line with the previous ruling of the Supreme Court in 1998—that poker must be classified as a game of chance. Unlike the Hague case, a criminal trial, the Leeuwarden case was a tax court case. The question of whether poker is a game of chance or skill is of importance for tax purposes because of the possibility that winnings are subjected to tax under the Tax on Games of Chance Act (*Wet op de Kansspelbelasting*). The court holds the view that the definition "game of chance" in the Tax on Games of Chance Act is the same as the definition stated in the Gaming Act. The Court of Leeuwarden followed the Supreme Court ruling of 1998, stating that poker is indeed a game of chance under the Gaming Act. Thus, poker is also a game of chance under the Tax on Games of Change Act and winnings are therefore subjected to tax under this act. This judgment is not yet final, pending the outcome of the appeal lodged by the claimant.

Pending the outcome of the appeal procedures, the possibility of being charged (and convicted) under the Dutch Gaming Act for organizing poker games remains unabated.

ECJ Judgments

Dutch betting cases *Betfair v. Ministry for Justice* and *De Lotto v. Ladbrokes* (C-203/08 and C-258/08, respectively) both address the compatibility of the Dutch gambling legislation with key principles of European Union law. With reference to the *bwin* ruling (C-42/07), the ECJ once again rejected the principle of mutual recognition in both cases: Article 49 EC (Article 56 TFEU) must be interpreted as not to preclude the Netherlands' legislation on gaming policy, under which exclusive rights to organize and promote games of chance are conferred on a single operator, and which prohibits any other operator, including an operator established in another member state, from offering games of chance in the Netherlands via the Internet. Consequently, it will no longer suffice for foreign licensed operators of online games of chance to invoke their foreign license in order to gain access to other member state markets in which a legitimate monopolist is active. In this respect the decisions are considered a setback to the interests of private operators.

Although the ECJ reiterated the rejection of the mutual recognition principle, the *Betfair* case also created a new battle

between operators and monopolists in Europe. Not only is the legality of a monopoly system questioned, but the debate has also shifted to how and to whom a monopoly is granted. The ECJ clearly stated that the principle of transparency applies to the procedure for the granting of a gaming license in a single-license system, which essentially means that the license-awarding procedures have to be open to competition. However, with paragraph 59, the court provided a much debated exemption to the transparency principle. The obligation of a member state to offer or renew a single private operator license through a transparent public tender process may be disregarded when the government subjects that private operator's activities to strict control. It will be for the national courts to determine whether this is the case.

The *Ladbroke's* case focuses on the relationship between policy consistency and advertising. The ECJ recognizes that the aim of the Netherlands' policy to protect the consumer against gambling and gaming addiction in principle is difficult to reconcile with an expansive gaming policy that is characterised by new games of chance and extensive advertising campaigns. Consequently, the ECJ bestows on the Netherlands Supreme Court the considerable task of establishing:

- "[W]hether the Netherlands is pursuing a policy of substantially expanding betting and gaming, by excessively inciting and encouraging consumers to participate in such activities, principally with a view to social fundraising, and that this is not merely an incidental beneficial advantage." If this is the case, then the ECJ "must conclude that such a policy does not limit betting and gaming activities in a consistent and systematic manner" (par. 28);

- "[W]hether in the context of that assessment, the unlawful gaming activities may constitute a problem in the Netherlands and whether the expansion of authorised and regulated activities could solve such a problem" (par. 29); and

- "[W]hether the expansion of games of chance can be supervised effectively by the Netherlands authorities, and simultaneously reconciled with achieving the objectives of consumer protection and combating crime" (par. 37).

Final ruling in the *Betfair* case is expected in March 2011, and the *Ladbroke's* case in mid-2011. These rulings could have severe consequences for the Dutch gaming policy. Reference can be made to the ECJ's judgements on the *Carmen Media* case on Sept. 8, in which they found that Germany's gambling regulations did not limit games of chance in a consistent and systematic manner and which have plunged the German gambling market into legal chaos.

Future Scope

It is clear that the current prohibition of all forms of remote gambling will most likely be abandoned. It is not inconceivable that a multiple licensing system for remote gambling will be introduced, but the precise scope is still unclear. The secretary of safety and justice will probably submit a policy letter to the House of Representatives in March 2011, presenting the outlines for policy perceptions on games of chance. It remains to be seen whether the Netherlands will follow the liberal approach toward remote gambling of, for instance, Denmark or the more restrictive approaches of Belgium and France.

With regard to offline gambling regulation, things are also moving. The outlines for intended policy changes presented in March 2011 could also provide more information about the current debate on the sell-off of state-owned Holland Casino. We expect drastic changes to the Gaming Act in 2011–2012. On a very final note, judgements in the Dutch *Betfair* and *Ladbroke's* cases could

very well expedite the decision-making of the new Dutch government if and when the Dutch national courts rule that the current Dutch gaming policy is incompatible with EU law.



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