

Dutch Gaming Authority installed ahead of opening up remote gaming market



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On December 20, 2011, the Dutch Senate approved the legislative proposal regarding the introduction of the Gaming Authority. The new independent regulatory body will be operational as of April 1, 2012, and will make enforcement of the Dutch gaming regulations much more effective.

A change in government in October 2010 resulted in plans to modernise the Dutch gaming policy. The State Secretary for Safety and Justice now responsible for the gaming dossier sent a policy note to the House of Representatives ("Tweede Kamer") on March 19, 2011, which marked a dramatic shift in the government's thinking on the regulation of all forms of gambling. These plans were fuelled by the final ruling of the Dutch Council of State in the post CJEU case *Betfair/Ministry of Justice* [Case 258/08]. The supreme administrative court held that the Dutch licensing procedure is in breach of EU law because the procedure failed to comply with the principles of non-discrimination and transparency.

The existing objectives of Dutch gaming policy, namely consumer protection and combating criminality and illegality, will remain the same. However, the manner in which these objectives are given effect is now subject to reform. The State Secretary announced plans to: i) introduce a licensing system for remote gaming in 2012 (currently subject to a total ban); and ii) in 2015 to shift away from monopolies in the offline sector (and possibly the privatisation of state-owned Holland Casino) to enable competition between operators. Under these plans all operators will function on the basis of licences awarded in a

consistent, transparent and non-discriminatory manner.

The liberal policy plans were followed by critical debates in parliament whereby Dutch MPs argued that the government's plans were too vague and that uncertainty prevailed. They were concerned about the possible harmful side effects of regulating remote gaming such as the impact on the prevalence of gambling addiction and on revenues generated for good causes and sports.

Subsequently, the Ministry has instructed external parties to conduct studies into remote licensing/taxation scenarios, potential cannibalisation effects, gambling addiction, technical and operational compliance requirements for remote gaming licences and finally a study into scenarios for the effective digital enforcement of illegal remote gaming. In some of these studies our firm plays an important role by providing legal expertise from the sector's perspective. A bill for the regulation of remote gaming is now expected in the first half of 2012.

Nevertheless, a legislative proposal regarding the introduction of a Gaming Authority (submitted back in December 2009) was pending and there was strong consensus in parliament that the Gaming Authority should be installed as soon as possible. The legislative proposal was adopted in the Dutch Senate without any votes being cast. The Gaming Authority will formally be operational as of April 1, 2012. Therefore, this article will focus on the objectives, structure and enforcement powers of the new regulatory body and the potential implications for both the offline and remote sector.

Introduction of the Gaming Authority

Background

The main argument behind the introduction of the Gaming Authority is to improve the effectiveness of the enforcement of the Dutch Betting and Gaming Act. According to the Explanatory Memorandum there is a lack of enforcement activities against unregulated gaming activities, especially regarding remote gaming, despite there being a total ban on such offerings in the Netherlands. Neither a B2C nor a B2B remote gaming operator has ever been criminally prosecuted for a violation of the Act.

This can be explained in a number of ways. Firstly, because the Act was only enforceable through means of criminal law which is considered as impractical, especially regarding foreign-based parties. The former Minister of Justice acknowledged in parliament that it is disproportionate and too time-consuming to try such matters before the courts. Strikingly the State Secretary even mentioned in parliament in 2011 that the Public Prosecution Department is unwilling to prosecute B2C operators.

Secondly, until April 2012, the national market is regulated directly and solely by the Ministry of Safety and Justice and other ministries according to the monopoly in question and the national Gaming Control Board ("College van Toezicht op de Kansspelen"), the latter being limited to providing advice to the government and generally regarded as a 'toothless tiger'. Both the Ministry and the Gaming Control Board do not have any actual

enforcement instruments.

Therefore, as indicated in the Explanatory Memorandum to the law introducing the Gaming Authority, for effective enforcement it is necessary that the Authority is equipped with adequate and proportionate administrative enforcement instruments.

Main tasks

The Gaming Authority will be awarded the status of an independent administrative regulatory body with operational tasks whereby the Ministry will maintain ultimate responsibility for instigating overall gambling policy. It cannot be excluded that there will remain the risk of a dependent relationship by the Authority leaning heavily upon the government, or the risk that it provides (indirect) protection to certain (incumbent) market players.

The Gaming Authority will be staffed with 35 full-time employees and an additional 13 full-time employees from "Verispect". This organisation was previously responsible for monitoring the slot machine sector. The Dutch Gaming Control Board ("College van Toezicht op de Kansspelen"), which advised the Ministry *inter alia* regarding the allocation of licences, has already been wound up.

The Gaming Authority will be the body that issues, enforces and revokes licences and supervises all Dutch licensees. Once remote gaming regulations are adopted, the Authority will be required to grant remote gaming licences in an open, fair and non-discriminatory manner. Importantly, following the above mentioned *Betfair* ruling, the Authority is not entitled to automatically allocate and renew licences in favour of incumbent operators without an open and fair process unless such operators are subject to very strict government control. Therefore, in our view a preferable position for, or preferential treatment of, incumbent operators in the licensing process will no longer be possible.

The Authority will undertake executive, enforcement and supervisory tasks concerning the gaming market in the Netherlands. The State Secretary stated that the Authority will need to closely cooperate with foreign regulators and mentioned in parliament those in Malta and Italy as examples. In addition, the Authority will provide educational services

and will act as knowledge centre for both the public and other authorities such as addiction care institutes.

In this respect the State Secretary explicitly mentioned in the parliamentary debate that high priority will be given to the introduction of a central register with problem players. In addition, the Authority will keep and regularly update a register with self-excluded players which is linked to both the offline and online sector (not including lotteries). As you can imagine, these registers will raise many privacy related issues and it remains to be seen how this will be worked out in greater detail.

Enforcement powers

Whereas originally only criminal measures could be used against unlicensed gaming operators that exploit their activities in the Dutch market, the amendment of the Act attributes to the Gaming Authority the power to use administrative measures against both licensed operators, (locally) unlicensed B2B and B2C operators, PSPs/ISPs and also affiliates. These administrative enforcement instruments should make enforcement more effective and efficient. The measures consist of:

- Administrative fines: most importantly both the Gaming Authority as well as municipalities will be entitled to impose an administrative fine upon both unlicensed and licensed entities which infringe the Act. The proposed fines could be as high as €760,000 and can be raised by 10 per cent of the annual revenue. It's not clear whether the total revenue of the company or only revenues generated in the Dutch market will be taken into account. Next to that the Gaming Authority or municipalities could in certain circumstances impose multiple fines for the same offence. Failure to object to the administrative fine means that it becomes irreversible. A fixed rate of €370 will apply in respect of minor offences, such as failure to comply with the prohibition on minors being present in amusement arcades.
- Administrative orders: administrative orders may be imposed on entities that have a physical presence in the

Netherlands. Both the Gaming Authority and the municipalities will be allowed to order physical changes to end violations of the gaming regulations. It can also set a term for the violator to undo a violation, enter and seal buildings and confiscate goods.

- Incremental penalty payment: both the Gaming Authority and municipalities will be able to impose an order for incremental penalty payments to enforce the gaming regulations. A violator failing to cease the illegal activities will be subject to a penalty for non-compliance. This order cannot be imposed if an administrative order is also imposed. These incremental penalty payments will mainly be imposed if a licensee does not comply with the rules in relation to the age of the participants of games of chance. Participants of the instant lottery, sports betting, lottery, casino and amusement arcades must have reached the age of 18. Secondly, incremental penalty payments can be imposed if there is an infringement with respect to specific provisions relating to gaming machines. This instrument can also be seen as an effective tool regarding violations of advertising provisions.

Criminal enforcement still possible

Although the Gaming Authority primarily enforces the Act by administrative measures as mentioned above, regular criminal prosecution cannot be excluded. Criminal prosecution by the Public Prosecution Service would generally be used in the case of serious offences of the Gaming Act and are considered as the 'ultimum remedium'. The Authority and the Public Prosecution Service will set up a cooperation agreement to divide competences for different offences under the Act.

However, the State Secretary already mentioned instances during discussions in the Senate in which criminal enforcement is required and desirable, such as: i) repeated serious infringements where administrative enforcement fails to have the desired effect; ii) where the infringement of the Act is also related to other criminal activities (such as money

laundering); and iii) in cases whereby a precedent is needed because criminal prosecution will have a serious deterrent effect for the rest of the sector.

Blacklisting

As mentioned before, the State Secretary is facing considerable resistance from within parliament as to his liberal plans for the regulation of remote gaming. In the latest debate on September 7, 2011, in the House of Representatives, which was scheduled to discuss the Gaming Authority, several MPs took the opportunity to question the State Secretary regarding the regulation of remote gaming.

Several MPs pushed the State Secretary on enforcing the current prohibition against unlicensed operators and ensuring that such operators will not qualify for remote gaming licences in the future. It is within this context that the State Secretary stated that he would undertake blacklisting as soon as possible as a means to ensure the blocking of financial transactions between Netherlands-based financial service providers and unlicensed operators.

Currently many remote operators have been receiving so-called "cease and desist" letters. These actions are being taken before the opening up of the remote gaming market, which theoretically means that any remote gaming operator targeting the Dutch market and accepting Dutch players could be addressed. Operators failing to comply with the conditions set out in the letter will be included on the blacklist.

The Gaming Authority will maintain and regularly update the actual list of operators. Details of operators listed will be sent to the Nederlandse Vereniging van Banken ("Dutch Banking Association") which will forward this information to its members so that they can take measures to stop providing financial transaction services to unlicensed operators.

However, there is considerable controversy with respect to the legal basis for the black-listing process and its enforceability. There is currently no specific act or legislation prohibiting the facilitation of financial services to unlicensed gaming operators. Although the State Secretary is inconsistent in his statements, he seeks to include the provision of financial services through a broad interpretation of the term 'promotion' in the prohibition of the promotion of illegal games of chance (Section 1(b) of the Act).

There is, however, no basis in the legislative history of the Act nor in any case law for such a broad interpretation. In our opinion, the promotion of participation in games of chance pursuant to Section 1(b) of the Act pertains solely to publicity and advertisements for games of chance and not to the provision of financial services. It seems that in the current situation the Ministry is stretching the connotation of Article 1(b) of the Act beyond its original intent in order to be able to tackle remote gaming operators.

Also quite remarkable is the fact that the State Secretary in the same discussions stated that he would consider the possibility of implementing provisions into the Act that would enable ISP and PSP-blocking. The fact that ISP and PSP-blocking need a legal basis in the announced reform of the Act could be understood as suggesting that there is indeed no such legal basis at the moment.

Another legal ground for the blacklisting process would be Customer Due Diligence regulations. Based on general KYC-requirements established in financial regulations, banks are entitled to (voluntarily) break off their relationship with 'illegal' operators.

Implications for the sectors

As we have experienced with the introduction of similar regulators in the Netherlands [such as the "OPTA": regulator for the electronic communication sector], it's not inconceivable that the Gaming Authority will show its teeth from the very beginning to make a statement and anchor its position in the political and regulatory landscape. Although of course it is difficult to predict, it cannot be excluded that the Authority will be particularly active from the start, possibly through especially targeting entities with a local presence which clearly act in violation of gaming regulations and which could be addressed easily and effectively.

Offline sector

In the last couple of years the incumbent monopoly players faced much criticism from parliament regarding their extensive advertising activities and policy regarding consumer protection. However, it was difficult for the government to effectively monitor and control the incumbent operators because their only enforcement

alternative was to revoke the licence which was considered as disproportionate. Next to that it was not practicable to revoke the licence of a monopoly player because it would then create a large vacuum in terms of supply and revenue generation.

The State Secretary explicitly mentioned that specific attention will be given to marketing activities. An amendment to the Gaming Authority bill has been tabled and approved which states that the Authority must provide specific regulations relating to the careful and balanced marketing and promotional activities by licensees. In this context it is possible that the Authority will undertake targeted actions against excessive advertising of the incumbents.

Next to that it must also be noted that we are still awaiting a final decision from the Dutch Supreme Court in the post CJEU case *De Lotto/Ladbrokes* (C-258/08), which essentially deals with the question to what extent a monopoly operator can advertise and make games attractive when the aim of the restrictive legislation is to prevent crime and problem gambling.

Remote sector

According to the former Minister of Justice, Mr Donner, action against operators of online games of chance will be one of the highest priorities for the Gaming Authority. Although some MPs are pressuring the State Secretary to take immediate enforcement action against current "illegal" unlicensed remote gaming operators and to disqualify them from future licensing procedures, it must be noted that regarding the latter the State Secretary was hesitant to comply with these calls. Nevertheless, currently the Ministry (and as from April 1 the Authority) will maintain a blacklist with "illegal" operators on the basis of which enforcement could take place.

It remains to be seen how the Authority will react to currently unlicensed operators until a new remote licensing regime is in place. Hopefully, there is an awareness that, apart from a legal point of view that at this moment this sanctioning policy cannot be considered legitimate in view of the *Betfair* ruling, a blackout approach has the potential to be highly counterproductive. The objectives behind regulating the remote gaming market will be frustrated if either the majority of operators are unsuccessful in future license applications or if operators are required to stop serving



Dutch consumers in the run-up to licensing.

There is a danger that their current consumers will fall into the hands of those who have no intention of obtaining a licence. The Authority is, however, designed as a body independent from the Ministry and it remains to be seen how the Authority will actually act in the transitional period up to the new remote licensing regime.

If and when the Authority will use its administrative enforcement powers, it must be noted that the administrative measures cannot be easily executed abroad.

Therefore, we anticipate at this moment that foreign-based entities cannot be effectively addressed by the Authority. The State Secretary, however, announced that an external party is currently conducting research into different scenarios for effective and efficient digital monitoring and enforcement of (cross-border) illegal remote gaming activities.

Nevertheless, administrative enforcement instruments may easily be imposed and enforced towards local entities or foreign entities with any assets, a subsidiary or agency in the Netherlands. Such entities with a presence in the Netherlands could face severe administrative penalties and fines when infringing the Act. In this context marketing of gaming related businesses (affiliate marketing) will likely be more complicated.

Apart from administrative enforcement, regular criminal prosecution by the Public Prosecution Service cannot be excluded, but the chance of such action is not affected by the introduction of the Authority.

Conclusion

2012 will be the year in which the legal landscape for (remote) gaming in the Netherlands undergoes a substantial redesign. While the Dutch government is

shaping new remote gaming policy and intending to present a remote gaming bill in the first half of this year, the Gaming Authority will already become operational as of April 2012. These developments will create both opportunities and risks for parties active on the Dutch gaming market such as operators, software companies, PSPs and media companies.

The Authority will actually have teeth to effectively enforce current and future Dutch gaming regulations which could particularly affect local-based entities or foreign entities with assets in the Netherlands. Nevertheless, it remains to be seen how the Gaming Authority will behave towards market players in the transitional period until the new remote gaming licensing regime unfolds. Without a transparent, sustainable and viable regulatory framework which is compliant with EU law, difficulties will remain with respect to enforcement.

Your partner in securing a Dutch remote gaming license

VMW Taxand's Gaming, Sports & Entertainment Practice

Our clients range from the worlds largest offline and remote (social) gaming and gambling operators, banks, PSPs, ISPs, software houses and testing labs to professional (poker) players, sports organizations and events organizers.

VMW Taxand plays a central role in numerous legal proceedings in which the validity of monopolies and licensing schemes are contested, before administrative, civil and criminal courts. We are deeply involved in the current process of establishing a regulatory regime for remote gaming in the Netherlands.



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