

THE DUTCH GAMING AUTHORITY AND RECENT DEVELOPMENTS IN THE NETHERLANDS

The Dutch Senate approved a legislative proposal on December 20, 2011, introducing a new independent regulatory body, namely the Gaming Authority. It has been operational since April 1, 2012, with the proviso of more effectively enforcing the Dutch Betting and Gaming Act. By **Younes Moussaoui** and **Justin Franssen** of VMW Taxand.

Background

The primary purpose behind the Gaming Authority is to effectively improve the enforcement of the Dutch Betting and Gaming Act (hereinafter 'DBGA'). According to the Explanatory Memorandum of the latest amendment, there is a lack of enforcement against unregulated gaming activities, especially with regards to remote gaming, despite there being a ban in force in the Netherlands. This lack of enforcement is principally down to two reasons. Firstly, because the DBGA was only enforceable through means of criminal law. Criminal enforcement is considered impractical, especially for foreign-based parties and because of capacity limitations, enforcing the DBGA wasn't a priority for the Public Prosecution Service. Secondly, until April 2012, the national market was regulated directly by the Ministry of Security and Justice (hereinafter 'Ministry'), the Ministry of Finance and the national Gaming Control Board. Both the Ministry and the Gaming Control Board, unlike the newly founded Gaming Authority, did not possess any actual instruments to enforce against unlicensed operators.

Main tasks

The Gaming Authority is an independent administrative regulatory body which presides over operational tasks whilst the Ministry maintains ultimate responsibility for determining overall gaming policy. The Gaming Authority is staffed with 35 full-time employees and an additional 13 full-time employees from 'Verispect',

which was previously responsible for the technical approval of slot machines. The previous Gaming Control Board, which merely advised the Ministry, has been wound up. The Gaming Authority will issue, enforce and revoke licences, supervise all licensees and will also function as a 'knowledge centre'. If and when remote gaming regulations are adopted, the Gaming Authority will grant remote gaming licences in a transparent and non-discriminatory manner. Importantly, following the Betfair ruling, the Gaming Authority is not entitled to automatically allocate and renew licences in favour of incumbent operators without a transparent and non-discriminatory licensing procedure.

Administrative enforcement

Originally, enforcement against unlicensed gaming operators offering their activities in the Netherlands was only possible through criminal measures by the Public Prosecution Service. The amendment to the DBGA attributes power to use administrative enforcement instruments over to the Gaming Authority. These administrative instruments should make enforcement more effective and efficient against local-based and foreign entities with assets in the Netherlands. These administrative instruments consist of:

- **Administrative fines:** importantly, both the Gaming Authority and municipalities are entitled to impose administrative fines upon both unlicensed and licensed entities which infringe the DBGA. These fines can be as much as €780,000 or ten percent

of the annual revenue, if it is higher than €780,000. It is not clear whether the total revenue of the company or only revenues generated in the Dutch market will be taken into account. Municipality fines can be as much as €78,000.

- **Administrative orders:** administrative orders may be imposed on entities that have a physical presence in the Netherlands. The Gaming Authority will be allowed to set a term for violators to bring themselves in-line with regulations, as well as enter and seal buildings and confiscate goods.
- **Incremental penalty payment:** a violator failing to cease illegal activities will be subject to a penalty for non-compliance. This order cannot be imposed if an administrative order is also imposed. This instrument can also be seen as an effective tool in addressing violations of advertising provisions such as the prohibition of promoting unlicensed games of chance or the Advertising Code of Conduct for Games of Chance.

Municipalities have had powers to enforce the latter two instruments prior to the amendment of the DBGA and as such, have been unaffected.

Criminal enforcement

Although the Gaming Authority will primarily enforce the DBGA by the administrative measures mentioned above, regular criminal prosecution cannot be excluded. Criminal prosecution by the Public Prosecution Service will generally be used in the case of serious offences under the DBGA and are considered as the 'ultimum remedium'. The Gaming Authority and the Public Prosecution Service will establish a cooperation agreement to divide responsibilities for different offences under the DBGA. However, the State Secretary has

¹Administrative Jurisdiction Division of the Council of State, 23 March 2011, IJN: BP8768 (The Sporting Exchange Ltd. vs. Ministry of Justice); The Council of State held that the Dutch licensing procedure is in breach of EU law because the procedure failed to

comply with the principles of transparency and non-discrimination. ²Response by the State Secretary for Security and Justice to several motions accepted by the parliament regarding the gaming policy (submitted May 4, 2012).

already mentioned, during debates in the Senate, instances in which specific criminal enforcement is required, such as:

- repeated serious infringements where administrative enforcement fails to have the desired effect
- where the infringement of the DBGA is also related to other criminal activities (such as money laundering)
- in cases whereby a precedent is needed in order to act as a deterrent for the sector

Enforcement policy

The State Secretary has faced considerable resistance from within parliament against his liberal plans for the regulation of remote gaming. In the plenary debate on September 7, 2011, which was scheduled to discuss the legislative proposal concerning the Gaming Authority, several MPs took the opportunity to question the State Secretary regarding the regulation of remote gaming. Proposals by some MPs pushed the State Secretary on enforcing the current prohibition against unlicensed operators and wanted assurances that such operators will not qualify for remote gaming licenses 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 institutions and unlicensed operators. Approximately 40 remote gaming operators received so-called 'cease and desist' letters shortly after this debate. In response to the plenary debate, the State Secretary recently released a policy letter in which he reacted to numerous proposals put forward by several MPs (hereinafter 'motions'). He mentioned in the letter that some operators had stopped offering gaming services to Dutch consumers, some operators had not responded to the cease and desist letter and have been placed on the blacklist and that some operators did not agree with the view of the government regarding this procedure, but nevertheless agreed to stop offering their websites in

the Dutch language and to suspend RTV and print marketing with a view to gaining a licence. Mr Jan Suyver, who made his first public appearance as the chairman of the Gaming Authority at the Annual Gaming Industry Event of VMW Taxand on May 25, 2012 in Amsterdam, announced that the enforcement policy will be made public and that the Gaming Authority will begin enforcement proceedings against blacklisted operators as of June 1, 2012.

The Gaming Authority will maintain and regularly update the blacklist. Details of listed operators have been sent to the Dutch Banking Association (Nederlandse Vereniging van Banken) 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 blacklisting process and its enforceability. For now, discretion rests with the banks and financial institutions in interpreting their customer due diligence requirements and, thus, there is no guarantee that the blacklisting of an operator will actually prevent it from carrying out financial transactions with Dutch residents.

The Gaming Authority published its enforcement policy on June 8, 2012, via a press release on its website. In the release, the Gaming Authority notes that enforcement priorities have been set because it cannot take action against all illegal gambling websites at once. Therefore, for the time being, it shall direct its attention towards those operators which satisfy at least one of the three "prioritisation criteria". These criteria are as follows:

- Websites offering games of chance with a '.nl' extension, and/or;
- Websites in the Dutch language, and/or;
- Advertising made by radio, television or print media directed at the Netherlands.

Should an operator fall foul of one or more of these criteria then the Gaming Authority may take enforcement measures.

Recent developments concerning the new regulation

Moves are afoot to introduce a regulatory framework for remote gaming and was originally planned to become effective during 2012. This timeframe appears increasingly unrealistic and we consider that 2013, or even 2014, is more likely. The State Secretary announced his plans to regulate remote gaming as well as to liberalise the offline sector back in March 2011, but critical debates in Parliament have delayed the legislative process. The State Secretary informed the Parliament in December 2011 that he would present a draft remote gaming bill in the first half of 2012. However, the fall of the cabinet on April 23, 2012, has frustrated this process and whether this will be picked up again depends on the result of the national election on September 12, 2012.

Nevertheless, in the policy letter of May 4, 2012, the State Secretary clearly dismissed the motion to adopt the Belgian model as a template for future regulation in the Netherlands and strongly favoured an "open licensing model" similar to that launched in Denmark. Despite this overall positive policy letter, in the government agreement concerning overall budget cuts for 2013 released on May 25 of this year, five parties decided to cancel the proposed introduction of a licensing regime for remote games of chance. It remains to be seen if, after the elections, the (new) State Secretary will stick to the plans as presented and, eventually, what shape any new regulations will take.

Conclusion

The Gaming Authority actually has teeth to effectively enforce current and future Dutch gaming regulations which could particularly affect domestic entities or foreign entities with assets in the Netherlands. Nevertheless, it remains to be seen how the Gaming Authority will behave towards all market players in the period until the elections in September 2012. Furthermore, it also remains to be seen how the political landscape might change after the elections and what effect this will have on any new regulations.

³[http://www.kansspelautoriteit.nl/nieuws/alle-nieuwsberichten/aanpak-illegale/](http://www.kansspelautoriteit.nl/nieuws/alle-nieuwsberichten/aanpak-illegale)
⁴House of Representatives, 24 557-124, 19 March 2011, Policy note

gaming policy.
⁵Senate, 32 264, 20 December 2011, Written report debate Gaming Authority.