DUTCH REGULATION INSIGHT SERVER REQUIREMENTS

The Dutch proposed bill on the regulation of remote gaming: implications of the server requirement, by **Dr Alan Littler**, Kalff Katz & Franssen Attorneys at Law, Amsterdam, and **Esteban van Goor LL.M.**, PwC Amsterdam.

Introduction

On May 22, 2013, the Ministry of Security and Justice ("Ministry") along with the Ministry of Finance published a draft bill which seeks to introduce the necessary legislative amendments to create a framework for the regulation of remote gaming in the Netherlands. Gaming is regulated by the Wet op de kansspelen (Betting and Gaming Act, "BGA") which dates from 1964 as amended. This brief article will focus upon the one particular aspect contained within the proposed bill that, if it were to become law, will require remote gaming licensees to establish their gaming server in the Netherlands. Having provided some background to the proposed legislative changes, we consider whether this requirement is likely to breach European Union law and the implications it could have with regards to taxation.

The current legislative regime is based upon a prohibited-unless-licensed approach whereby, subject to a few relatively minor exceptions, the provision of gaming services is illegal unless a licence has been awarded for the particular form of gaming in question. As of April 1, 2012, the Kansspelautoriteit ("Gaming Authority") is the competent body for the award of licences available under the BGA as well as supervising the sector and enforcing applicable rules and regulations. However, as the BGA currently stands, it does not provide the Gaming Authority with a legal basis to award licences for remote gaming services. In the absence of such a legal basis, no licences for remote gaming have been awarded under Dutch law and all remote gaming offered in the Netherlands is unlawful regardless of the fact that an operator may be regulated in another jurisdiction, including jurisdictions within the European Union.

Proposed bill on the regulation of remote gaming

Against the backdrop of the government's drive to regulate remote gaming, the proposed bill was published in May this year but only for the purposes of a consultation procedure for which submissions could be delivered by all interested parties until the end of July 2013. Therefore, in light of the views which the Ministry receives, it can be anticipated that the proposed bill and accompanying explanatory memorandum will be amended and submitted to the lower house of parliament, the Tweede Kamer, in early autumn. In the absence of any major hiccups, the necessary legislative amendments to the BGA will hopefully be on the statute books by 2015 and we anticipate that licensing will start in the same year.

Notwithstanding numerous 'blind spots' created by the deference of the proposed regulatory framework to secondary legislation, which is not yet available, the proposed bill makes for relatively comfortable reading. Broadly speaking, the bill is centred around the object of capturing 75 percent of the market with '.nl' licensees ("channelling") so as to underpin the attainment of consumer protection aims. There will be no cap on the number of licences and a broad range of permitted forms of gaming is anticipated, particularly in light of the recognised need for an attractive and suitable offer, although secondary legislation will detail those forms which are allowed. During the previous government, there were calls to follow the example set by Belgium and require that remote gaming operators have a land-based operation. Fortunately, this has not been adhered to and the proposed explanatory memorandum explicitly recognises that operators will be permitted to have their

statutory seat elsewhere within the EU/EEA or a designated third country. However, the proposed bill will require that licensees have a reference data bank in the Netherlands so that vital information can be accessed by the Gaming Authority and other authorities "at all times". The explanatory memorandum notes that this requirement can be made, in contrast to any requirement relating to a "primary seat" because "it is only about the obligation of keeping accounts and making the relevant data available to the supervisory bodies concerned".

In addition to the proposed 'reference data bank', the bill refers to "electronic means (hardware and software) for the organisation of remote games of chance". The explanatory memorandum explains that such "electronic means", understood to equate to the gaming servers, will have to be placed in the Netherlands in the absence of a cooperation agreement between the Gaming Authority and relevant "supervisory body" of the jurisdiction where the server is located. Interestingly, it is explained that an "absolute obligation" requiring all servers to be placed in the Netherlands would be too costly and would threaten the attainment of the channelling objective. Whilst the bill as proposed will introduce a legal basis for the Gaming Authority to conclude such agreements with its peers, ultimately, whether operators have to establish a server on Dutch soil will rest upon whether such agreements have in fact been concluded.

Server requirement under EU law

Thus, an operator could be required to place a gaming server in the Netherlands and this has close parallels with the *Dickinger & Ömer* (*C-347/09*) case. In this case, the Court of Justice of the European Union ("CJEU") had to consider the compatibility with EU law of a requirement of Austrian law that an Internet casino operator had to have a registered office in Austria.

It is a firmly established principle of EU law that the exercise of the free movement of services cannot be conditioned upon the need to be established in the Member State where the services are provided. Therefore, could the requirement that a licensee's server be placed in the Netherlands in effect condition the provision of gaming services upon an operator becoming established in the Netherlands? In other words, can the server be considered as a form of establishment? EU case law on when an economic activity falls to be treated as the provision of a service or one of establishment does not draw any hard, crisp rules. Attention has to be directed towards not only the duration of the service is provided, but also its "regularity, periodicity or continuity" (Gebhard, C-55/94). Furthermore, it has been recognised that a person providing services in another Member State should be "able to equip himself with some form of infrastructure in the host Member State" (Gebhard). Once an activity is provided on a "stable and continuous basis" in the Member State where the services are offered, such provision will shift to establishment when the individual "holds himself out from an established professional

base to, amongst others, nationals" of the host Member State (Gebhard).

Our concern is that if a holder of a '.nl' licence has to provide such services from a server located on Dutch soil, then this will constitute a form of establishment and thereby precondition the provision of remote gaming services on the need to be established in the Netherlands. Indeed, the server will constitute a regular and continuous presence in the Netherlands and it is probable that licensees will appear as if they are operating out of the Netherlands to Dutch residents, particularly in light of being required to use a '.nl' URL extension and any eventual statement stipulating that they are licensed by the Gaming Authority.

There is no absolute prohibition on provisions which restrict the free movement of services in the EU, but those which discriminate on the basis of nationality can only be justified, and thereby considered compatible with the Treaty on the Functioning of the European Union ("TFEU"), on the basis of the narrow grounds of exception provided for in the TFEU which have to be interpreted restrictively. This was the case with the aforementioned restriction in *Dickinger & Ömer* whereby the local provision requiring a registered office in Austria would be unjustified if other measures existed which were less restrictive but would ensure an equivalent level of supervision over operators established in other Member States. The same applies to the server requirement; if there are other measures which could be taken to supervise the activities of locally licensed operators which are less restrictive than requiring the servers providing gaming services for the Dutch market to be located in the Netherlands, then this restriction will not be justifiable on the basis of the narrowly construed and restrictively applied TFEU-based "public order, public safety and public health" exception to measures which discriminate on the basis of nationality.

Any such justification is eroded through the recognition that electronic access to the reference data bank in the Netherlands and gaming systems abroad will enable an adequate degree of supervision to be reached. As such, the situation can be distinguished from that in *Dickinger & Ömer* whereby the CJEU recognised that Member States may monitor economic activities being carried out in their jurisdiction and that such monitoring would be impossible if they had to rely on checks done by other Member States using systems outside of their control. Through securing remote access to data, rather than concentrating on the location of that data, the Gaming Authority would not be relying upon controls carried out by regulators elsewhere within the EU/EEA.

Therefore, not only does it appear that the gaming server requirement as proposed could precondition the provision of gaming services in the Netherlands upon the need to be established, it is likely that, in light of the availability of other supervisory techniques, it will be incompatible with EU law.

Tax-related issues generated by the server requirement

As explained, licensees will be required to set up a reference data bank in the Netherlands, i.e. to allow Dutch supervisory bodies (such as the Dutch tax authorities and the Gaming Authority) access to the data. In addition to this, operators will – most probably in practice – have to locate a server in the Netherlands as noted earlier.

This may trigger questions by operators related to the tax consequences of setting up a reference data bank and the gaming server in the Netherlands. In the following section, we will briefly describe our view on the tax consequences (corporate income tax ('CIT') and VAT) in this respect.

Permanent/fixed establishment

Both for CIT and VAT, a similar concept of permanent (for CIT)/fixed establishment (for VAT) exists. Both concepts have the background of securing the sovereignty of levying tax in case of cross-border operations (i.e. taxing income for CIT purposes or determining the place of supply for VAT purposes).

Even though both CIT and VAT concepts look very similar, there is a small distinction between both concepts. For CIT, a permanent establishment is considered to be present in case a company established in a country (X), has a fixed place of business in another country (Y) through which it carries on business. A typical example of a permanent establishment is the branch office of a bank, present in another country than the country of establishment. In case there is a presence of a permanent establishment in a country, it will be treated as a separate entity. Consequently, for the calculation of taxation (CIT), the country (Y) in which the permanent establishment is present will be entitled to tax the profits (minus costs) attributable to the permanent establishment and the state of residence of the company (X) will generally (have to) provide relief for double taxation.

For VAT purposes, there is not just one concept of a fixed establishment; there are two, i.e.:

- a sales fixed establishment; and
- a purchase fixed establishment

However, to avoid going into too much detail, we will only discuss the concept of a sales fixed establishment from a VAT perspective. Such a fixed establishment is identified

for (Dutch/EU) VAT purposes in case an establishment (other than the place of establishment of a business) is characterised by a sufficient degree of permanence and suitable structure (humans and technical resources) to enable it to provide services. In case there is a presence of a fixed establishment (within the EU), it will be treated as a VAT taxable person (i.e. it will need to meet VAT compliance obligations and will be treated as such for determining the place of supply of services for VAT).

As the presence of a permanent establishment and fixed establishment has an impact on the CIT and VAT treatment, it is important to determine to what extent a reference data bank or gaming server is regarded as relevant for CIT/VAT.

Reference data bank

As a measure of supervision, the proposed BGA requires a so-called reference data bank in the Netherlands. The identified Dutch supervisory bodies will have immediate access to this database.

For tax purposes, we feel that this reference data bank will, in principle, not need to trigger a permanent establishment (for CIT) or a fixed establishment (for VAT). The reason for this is that the reference data bank will not enable an operator to carry on his business via this infrastructure (CIT) nor provide the operator with a suitable structure to provide services (VAT).

The situation might be different in relation to the gaming server through which the operator offers his services in the Netherlands.

Gaming server/'.nl' extension

Besides the presence of a reference data bank, the Dutch supervisory bodies will also need to be provided access to the gaming server of the operator which will most probably be located in the Netherlands. Moreover, operators will be obliged to offer their services via a '.nl' extension.

For CIT purposes, setting up a gaming server in a country will trigger the question whether there is a presence of a permanent establishment. The Organisation for Economic Co-operation and Development (OECD) has provided guidelines in this respect. The OECD makes a distinction between the computer equipment (server) and the data and software which is used by, or stored on, that equipment. Based on these guidelines, the following conclusion can be drawn:

- an Internet website ('.nl' extension) does not constitute tangible property, and thus, does not qualify as "a fixed place of business" for CIT purposes (no permanent establishment);
- a server on which the website is stored and through which it is accessible does qualify as a "fixed place of business". However, a distinction should be made:
  - in case the website is hosted on the server of an ISP – in principle, no permanent establishment will be present as the server and its location are not at the disposal of the enterprise;
  - in case the website is hosted on a server which is owned or leased by the enterprise – it could constitute as a permanent establishment, i.e. in case the server is located at a certain place for a sufficient period of time. Please note that if the gaming server constitutes a smart server (e.g. a server which is used to host the website, deal with deposits/withdrawals, verify payment details) it will most certainly qualify as a permanent establishment.

For VAT purposes, setting up a gaming server as such will not, in our view, principally trigger a fixed establishment, as it will not have personnel – or if personnel is present will have a supportive function – in relation to the services provided (and will not provide services itself).

Final words

Setting up a gaming server in a country within the EU will trigger questions on whether or not this may qualify as a form of establishment from both an EU law and tax perspective. It is important to be aware of the questions which may arise where a gaming server is set up in the Netherlands and to determine the consequences for taxation upfront. Furthermore, requiring operators to do this as a condition of their licence, for the reasons discussed in this article, will most probably render the proposed regulatory regime incompatible with EU law.

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