

THE  
GAMBLING LAW  
REVIEW

FIFTH EDITION

Editor  
Carl Rohsler

THE LAWREVIEWS

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GAMBLING LAW  
REVIEW

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# PREFACE

*As flies to wanton boys are we to the gods.  
They kill us for their sport.*<sup>1</sup>

It was in these sombre terms that Shakespeare spoke of fate and chance, and man's place in the world, in *King Lear*. The play was first performed in December 1608, and the timing is significant because, for the previous several months, all of London's theatres had remained shut by government decree. Each day a formal notice (known as a Plague Bill) had announced the number of dead in the city, and it was only when the numbers had dipped sufficiently that the theatres and other entertainments were permitted to re-open.

Writing a cheerful and optimistic preface to a book on the laws of gambling is trickier than I had imagined it would be a couple of months ago. Over the past few weeks (I am writing in April 2020), the world has begun to face a unique and important challenge. Most of us are isolated from each other and at the same time surrounded by the very substantial effects of the coronavirus pandemic, which is leading to huge economic stresses, crashing financial markets, massive travel disruption, and the greatest restriction on personal liberty since the end of the Second World War (to say nothing of the illness from which hundreds of thousands are currently suffering). Against such a background, it is hard to find something eye-catching to write about what seems, by comparison, the rather prosaic topic of gambling regulation. Still, that is the task before me.

One thing that the current crisis highlights is that, although humans persist in thinking of the world as divided into separate jurisdictions, viruses are less troubled by those niceties. It has never been clearer that we are a single species in an international community and that whether one is seeking to control the proliferation of gambling or germs, the key to effective action is international coordination. If the current pandemic holds some general lessons for policymakers, perhaps they are these:

- a* the world has become completely interconnected and, whether we are legislators, regulators or operators, one cannot simply consider what happens in the narrow confines of one's home jurisdiction;
- b* in order to have an effective response to a common problem, it is necessary for governments to work with a unity of purpose. A respect for international comity is crucial to any effective regime. Everyone has to recognise that they not only have a duty to create effective regulation for their own jurisdiction, but also to implement one that does not ignore the needs of countries around them;

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1 William Shakespeare, *King Lear*, Act 4, scene 1.

- c* although the problem is an international one, there are still some differences between societies, which means that a spectrum of different approaches may be appropriate; and
- d* no-one has all the answers and, when faced by complicated challenges, we would all benefit by learning the lessons of those around us.

It is also instructive to watch how cooperatively people react to curfews, closures and travel bans. It seems that, like gambling operators, the general public is willing to submit to stringent regulation and endure some hardship when it is clearly for a common and important good, even if at the expense of personal wealth and liberty. However, the cooperation of the regulated is always to a large extent required, and that cooperation is conditioned on there being an acceptance that restrictions are logical, proportionate, applied without discrimination and, above all, effective in combating an accepted problem.

Gambling regulators and politicians are no doubt reflecting upon these points. More regulation may sometimes be needed (but, equally, it may not always be productive). Operators are prepared to take many steps to protect against underage or inappropriate gambling patterns, but imposing unwarranted restrictions or creating burdens that are too high or ineffective simply creates a distraction, and may risk undermining the respect in which regulators are held. There is a complicated balance to be struck between defending the vulnerable from harm and protecting the public's freedom to choose its leisure. Never was that balance more starkly in focus than today.

It is easy to see that the current crisis will have a sharp impact on different aspects of the gambling world. With no sport for three months, there is literally nothing to bet on. Bingo halls, arcades and casinos will be heavily hit, and many will not survive. Even large-scale lotteries are being suspended. But with millions stuck at home and looking for new entertainment, virtual betting and online gaming will surely be growth industries.

Will coronavirus have a long-term impact on our society? The answer is yes. But the impact will not be measured by a temporary increase in the amount of hand-washing. For some years, we have been undergoing a social evolution caused by the opportunities that new technology can bring. We have become more connected, more impatient, more capable of listening to more than one channel at once and more accepting of having a virtual world as a substitute for the real one. For all that, some areas of society have been slow to transition to new ways of behaving. While many of us could work from home, it was still generally viewed as the exception rather than the rule. In the same way, millions of us still congregate in order to be entertained – whether for sport, cinema, theatre or casino. But the scale of the publicity and of the practical necessity of large-scale enforced isolation is going to mean we embrace a cultural shift more quickly than we had imagined. In my view, it will lead to a significant and long-term impact both on how and where we work, and how and where we play.

With that in mind, at the beginning of a new decade, it is perhaps worth looking back to see where we have come from and to where we may be heading in terms of the way that leisure time is spent (at least among those in the developed economies).

In 2010–11 we saw the birth of both Instagram and Snapchat, two of the world's most popular software applications. Both were at the vanguard of the second generation of social apps following the ground-breaking achievements of Facebook and Twitter. Both accelerated an important social change because, combined with the ubiquity of GPS telephones with cameras, they made our communication patterns more data-rich, visual and granular. In doing so, they have highlighted a facet of our value system in an unexpected way. Photographers and reporters used to take pictures of important events occurring in the

outside world that they wanted to record and show them to a wide number of people. We now take pictures of trivial incidents to illustrate and record our personal lives in a way that is designed to be viewed by small audiences of friends. Indeed, such has been the importance of the geo-located photograph that Instagram has actually managed to create its own landmarks: places that have become important in their own right only because they happen to be where other users have visited and geo-marked. Instead of looking through the telescope, we are looking in the mirror. And, in a world now self-isolating and physically distancing, the focus on the individual connecting to others virtually is only going to get stronger.

Uber began its operations in California in 2009 and Airbnb started a few months before that. Both companies have profoundly influenced what were the relatively traditional businesses of transport and accommodation. Although the approach of each is different, both of them have contributed to a new spirit in which the individual (whether giving or receiving a service) is placed in a unique position, at the centre of the map of their life. Public transport becomes personalised transport. Mass accommodation has become a personalised home. An entire economy is being built around individual choice.

Finally, we are experiencing three sorts of payment revolution. First, we have stopped using cash and now pay invisibly. Contactless payment mechanisms using RFID were first trialled in 2007 and first became usable through mobile phones (using near field technology) in about 2014. The e-ticket at check-in has become the norm rather than the exception. The second revolution is that many of the things that we purchase are rented, not owned. Rather than owning things, we use services.

There has also been a sea-change in the places where we spend money. Congregating on a Saturday afternoon at the retail mall had already gone into sharp decline before it recently became actually illegal. Home delivery (of literally everything imaginable) had already become normal before it became necessary.

Laying behind all of these changes is a profound evolution in what is recorded about our lives, as well as what we choose to record ourselves. The growth of processing power and the size of the data sets mean that our needs, habits, likely wants and vulnerabilities will all be more and more accurately detectable. We can expect our ability to make predictions about consumer behaviour (including where we go, what we do and the viruses that we carry) to become significantly more sophisticated. These improvements will both determine how and in what forms gambling and entertainment is presented to it and, crucially, how we react to that entertainment, and when it is perceived as doing us harm.

How will these developments change the world of gambling? I believe that 2020 will be a tipping point for everything; an earthquake within a longer-term tectonic drift from land-based to remote gambling, and from public to private entertainment experiences. Contactless payment, contactless entertainment, the continued rise of the online but isolated individual. An international community that is connected more, but touches less. Gambling experiences will need to address themselves to the personal needs, wants and vulnerabilities of individual players if they are to appeal.

To give perspective, back in the mid-1990s, as a young lawyer, I went to a conference at which we were addressed by a member of Gaming Board for Great Britain (as the regulator was then known). Having finished his presentation, a member of the audience asked him what he thought of the apparent rise of remote gambling. He replied that, although some people might do it, it would be unlikely to take off, because it could simply not challenge the excitement and entertainment of a day at the races. I mention that anecdote not to poke fun at the speaker, but rather to emphasise that, at the time, he was explaining a perfectly

legitimate and sensible view of the world (in a decade when it was a normal evening's entertainment to go to a shop to hire a video cassette and then post it back through the front door of the shop the next morning). While it is true that attending a live sporting event is still a very popular collective experience, and will continue to be so for many years to come, those activities are currently effectively prohibited in the UK, just like Shakespeare's plays in the early 17th century.

That is the somewhat strange context in which this present volume is written.

*The Gambling Law Review* is designed for practitioners across the world who want to find a way quickly to digest and understand the framework of gambling legislation in key jurisdictions. Once again, this year, the scope of our work coverage has increased to 28 chapters. There are new contributions from Argentina and Switzerland, and I am delighted to welcome those authors into the growing family of practitioners who help to write this book.

As well as new jurisdictions, there is also something instructive in every chapter, with a review of new legislation and case law, and a section dedicated to the key events of the past 12 months and the things to look out for in the next.

I would like to close by thanking all of our contributors, without whose labour this book would not be possible. They have each provided excellent chapters. I wish them, and all of our readers, good health as we fare forward. Next year will be better.

**Carl Rohsler**

Memery Crystal

London

April 2020

# NETHERLANDS

*Alan Littler*<sup>1</sup>

## I OVERVIEW

### i Definitions

Article 1(1)(a) of the Betting and Gaming Act (the Act) defines games of chance as ‘an opportunity to compete for prizes or premiums if the winners are designated by means of any calculation of probability over which the participants are generally unable to exercise a dominant influence’. A prize or premium is to be understood as anything that has an economic value and thus includes in-kind prizes as well as monetary ones and may well entail that the definition of a game of chance also captures social gaming. Payment of a stake is not required.

In its prevailing format, the Act only defines those games of chance for which one or more licences can be awarded for the offering thereof. These are explained in greater detail under Section II.iv. No general categories such as ‘betting’ or ‘gaming’ are used.

On 19 February 2019, the Senate approved the remote gambling bill, which was published as the Remote Gaming Act a day later. It will amend the underlying Act so as to enable licences to be awarded for remote games of chance. These amendments have not yet entered into force. Two types of licence will be awarded: sports betting and casino gaming. Within these two categories, poker, casino games, slot machines, sports betting (fixed odds), exchange betting, *pari-mutuel* betting, live betting and short-odds bingo will be permitted, while online lotteries (including long-odds bingo), spread betting and betting on non-sports events will remain prohibited. Offering bets on virtual sports (where the outcome is generated by a random number generator and treated as casino games), fantasy sports (regarded as sports betting) and e-sports will in principle be allowed, subject to conditions being satisfied.

### ii Gambling policy

The regulation of gambling is guided by offering a legitimate alternative to unlawful offers through which demand can be ‘channelised’. However, the use of monopolies per type has been implemented so as to reduce competition between operators with a view to preventing the excessive consumption of gambling services. Prior to the introduction of some forms of gambling, legislative texts reveal that the generation of revenues (e.g., for sports) was a key motivating factor. There will not be a cap on the number of remote gambling licences available, but strict regulatory requirements will be relied upon to achieve the same regulatory objectives. Another key line of reform was set to be the dissolution of Holland Casino’s

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<sup>1</sup> Alan Littler is a gaming lawyer at Kalff Katz & Franssen Attorneys at law, and would like to thank Chris Adriaansz for his assistance.

monopoly on the provision of casino gambling and the privatisation of this state-owned operator. However, following criticism from the Senate, the bill making privatisation possible was withdrawn in May 2019. An eventual sale of Holland Casino will not be going ahead in the near future.

Gambling is not regulated with a view to it being exported.

### **iii State control and private enterprise**

At present, the Dutch gambling landscape is populated by a mix of state-owned and private entities operating alongside each other, within their clearly defined market segments.

Space for private operators is found within the good causes lottery sector, the slot machine sector and the horse-racing totalisator. While holders of licences for non-incidentals games of chance (good causes lotteries) are private entities, it must be noted that operators of such licences are prohibited from generating private profits. Scope for the generation of private profit is restricted to slot machine arcade operators.

The remainder of the licensed gambling market is supplied by state-owned operators. The existing 14 casino venues are operated by state-owned Holland Casino, while various entities under the umbrella of the Nederlandse Loterij operate the state lottery, sports betting, lotto and instant lottery (scratch cards). In April 2016, De Lotto was taken over by the Staatsloterij, resulting in the formation of the Nederlandse Loterij. While the Staatsloterij is a publicly owned operator, De Lotto was a private non-profit making foundation. This takeover, and thus expansion of the state's gambling operators, conflicts with earlier pronouncements that providing gambling is not a task for the state.

### **iv Territorial issues**

The Gambling Authority is the sole body competent to award licences that enable the exploitation of games of chance in the Netherlands. This thus encompasses all of the exclusive licences, as well as licences for non-incidentals games of chance and the exploitation licences for slot machine operators. Local municipalities are empowered to award premises licences for slot machine operations within their geographical areas and establish limitations on such venues in local ordinances (e.g., a cap on the total number of venues, opening times).

### **v Offshore gambling**

Other than the forms of gambling explicitly exempt from the prohibition on unlicensed games of chance, all unlicensed forms of gambling that are made available in the Netherlands are unlawful. In terms of the legality of the offer, it is irrelevant whether such offers originate from within the Netherlands or outside. Further, it is irrelevant whether the offer is licensed or unlicensed elsewhere, or originates from within the EU or EEA or further afield.

With a view to the introduction of a licensing regime for remote games of chance, and subsequently channelling 80 per cent of the market into operations regulated at the national level, initially the Netherlands was not aggressive in seeking enforcement against operators present on the Dutch market. However, there has been an uptick in enforcement since late 2018.

In June 2012, the Gambling Authority introduced its enforcement approach, referred to as the 'prioritisation criteria', which was expected to bridge a relatively short transitional period until the licensing of remote gambling could begin. Through reliance upon the June

2012 prioritisation criteria, the Gambling Authority sought to prioritise its enforcement efforts against the de facto remote gambling market. Operators who were offering remote gambling in breach of those criteria would be at a higher risk of enforcement.

In May 2017, a considerable shift in the Gambling Authority's approach was announced by way of a press release. As of a couple of days later, on 1 June 2017, the new approach would apply. The new approach was based upon a non-exhaustive list of triggers, these being (the first three of which formed the 2012 criteria):

- a* offer games of chance on a website available in the Dutch language;
- b* offer games of chance on a website ending with a .nl URL;
- c* use radio, television or print media advertising targeted at the Netherlands;
- d* use of a domain name that refers to gambling and is associated with the Netherlands (e.g., 'Clog Bingo');
- e* presence of symbols that contain elements closely associated with the Netherlands (e.g., windmills);
- f* use of payment methods closely associated with the jurisdiction; or
- g* the absence of geo-blocking measures.

Compliance with the criteria only reduces the likelihood of enforcement, but the offer remains illegal under Dutch law. Given delays in the legislative process, the introduction of the remote gambling licensing regime is still pending in 2020. Therefore, the prioritisation criteria remain applicable.

As of 1 January 2020, another potential trigger for enforcement action came into force, namely the requirement that operators visibly verify (using 'an objective means of proof') the age of Dutch players before the registration process is completed. Failure to verify the age before completion of the registration process will also weigh negatively in the reliability assessment performed by the Gambling Authority during the licence application process. The rationale behind the requirement is that minors should not be able to participate in the gambling offer. The Gambling Authority has stated that the protection of the Dutch consumer is the guiding principle in its fight against illegal remote operators. The requirement has the potential to be problematic given that regulatory regimes, such as those applicable in Malta, do not require operators to immediately verify the age of a player upon an account being opened, but only upon a trigger at a later stage.

Up until debates in the Senate in February 2019, it was expected that those operators that had been sanctioned for their presence on the Dutch market prior to the licensing process being introduced would be excluded from the licensed market (where failure to abide by the prioritisation criteria would be the trigger for such sanctions). Suggestions were made that those that had paid such fines would be able to enter the market at a later stage, while those whose fines were unpaid would be excluded permanently. However, during debates in the Senate, a motion (the 'Postema motion') was passed calling for operators present on the market to be subject to a two-year cooling-off period in order to be eligible for a remote gambling licence. In July 2019, the Gambling Authority published a draft policy rule meant to carry out the Postema motion. According to the draft policy rule, the cooling-off period applies for 24 months prior to the date of the licence application and then during the application process itself. Operators will not be eligible for a licence if, for this period, they have not complied with cooling-off criteria. The cooling-off criteria consist of the same set of criteria as the aforementioned (2017) prioritisation criteria, except for the geo-blocking requirement. In a letter dated 3 March 2020, the Minister for Legal Protection informed

the House of Representatives that the cooling-off period will be extended from 24 months to 30 months. This extension follows the six months' delay to the entering into force of the licensing regime. Operators without an unlicensed presence on the market will not be subject to this period; incumbent land-based operators and international remote gambling operators who have not offered their services in the Netherlands will be able to apply for a licence immediately, upon the application process opening.

## II LEGAL AND REGULATORY FRAMEWORK

### i Legislation and jurisprudence

Dutch gambling law permits a range of gambling products to be offered pursuant to the Act, which was initially introduced in 1964 and has been subject to various amendments in the decades since. Article 1(1)(a) of the Act performs two key functions: it establishes that it is prohibited to offer unlicensed games of chance in the Netherlands and provides the definition of a game of chance. This prohibition is flanked by two further prohibitions, that on promoting unlicensed games of chance (Article 1(1)(b) of the Act) and that on knowingly participating in such games (Article 1(1)(c) of the Act).

Prior to the entry into force of the Remote Gaming Act, licensed offers can only be provided offline, subject to two exceptions. First, some of the incumbents are permitted to offer their land-based offering via the internet, which is referred to as the 'e-commerce exception'. The internet is seen as merely constituting an additional sales channel for the land-based offer, and the e-commerce offer must not go beyond the land-based offer. Second, holders of a licence for non-incident games of chance can also sell their tickets online and operate without the need for an offline outlet. However, neither of these two exceptions represent a true remote gambling offer.

There are several forms of gambling that are exempt from the requirement to be licensed and, therefore, can be offered without the provider breaching Article 1(1)(a) of the Act, conditional upon applicable conditions being satisfied. Such forms include promotional games of chance and small-scale gambling.

In terms of the scope of the prohibition on promoting unlicensed games of chance, a January 2019 decision of the District Court of The Hague confirmed that it includes activities typically undertaken by affiliates. Case law has established that the prohibition does not include payment services. The prohibition on promoting unlicensed games of chance will be expanded by the Remote Gaming Act so as to cover the facilitation of such games, and will encompass other intermediary service providers, such as payment service providers.

A key case that has been influential in shaping discourse in the Netherlands is *Sporting Exchange*.<sup>2</sup> Following the judgment of the Court of Justice of the European Union in the preliminary reference proceedings in Case C-203/08, where the court held that the lack of a transparent licence allocation procedure for an exclusive licence is incompatible with the freedom to provide services unless the holder thereof is a private operator subject to strict control or a public operator subject to direct control, the Council of State rendered a game-changing decision. In its judgment of 23 March 2011, it held that neither the holder of the single sports betting licence nor that of the horse-race betting licence were under suitably strict control so as to justify the lack of a transparent licence allocation procedure.

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2 ECLI:NL:RVS:2011:BP8768.



Subsequent judgments of domestic courts have reiterated this position, notwithstanding changes that were made to the governance of De Lotto in an attempt to bring it under sufficiently strict control. The takeover of De Lotto by the Staatsloterij, a state-owned entity, does not automatically justify the lack of a transparent licence process for De Lotto's licences; De Lotto must be deemed to be under direct control.

This line of case law also resulted in the introduction of a transparent licence allocation process in 2016 for the award of the single horse-race betting licence (valid between 2017 and 2022). The 2011 decision has also shaped legal discourse around the licensing process for the licences for non-incident games of chance, as well as filtering through to the level of local municipalities in terms of premises licences for slot machine arcades.

## **ii The regulator**

The Gambling Authority, which is based in The Hague, is an independent regulatory organisation tasked with the supervision and enforcement of the Act, including the award of licences available pursuant to the Act.

## **iii Remote and land-based gambling**

While land-based gambling is permitted and regulated, remote gambling is prohibited, given the lack of a legal basis for the Gambling Authority to award remote gambling licences. The legislative changes of February 2019 have not yet entered into force. As noted elsewhere in this chapter, a few opportunities currently prevail for some forms of gambling, offered pursuant to existing licences, to be provided via the internet.

## **iv Land-based gambling**

### ***Casinos***

The provision of casino gambling is subject to a monopoly, held since its inception in the 1970s, by Holland Casino, which is owned by the state. Holland Casino operates 14 venues nationwide, providing both table and machine gaming.

### ***Amusement arcades and machine gaming***

In contrast to the entire land-based market, save for licences for non-incident games of chance, the slot machine sector is the only one to which no cap on the number of licences applies.

In order to operate a slot machine arcade, an exploitation licence is required from the Gambling Authority, while a licence is also required from the relevant local municipality in relation to the premises in which the slot machines are located. Licences can be awarded to cafés and restaurants that are targeted towards those over 18, as well as to premises that are dedicated to the provision of such games of chance. Local municipalities are competent for deciding whether slot machine arcades are permitted within their municipality, and if so, how many, where, and other restrictions such as opening times.

### ***Betting shops***

Two monopolies prevail in the field of betting: that for sports betting, as operated by Lotto BV, which is part of the Nederlandse Loterij, the public lottery operator; and for horse-race betting, which is operated by ZEBetting & Gaming Nederland BV. Both licences are of the type referred to as ‘semi-permanent’, given that they are valid for a period of five years and have been reallocated to the incumbent holders.

Other offline forms include the lotto, whereby participants predict a given number of symbols from a predefined range, from which a draw is then made. Lotto is offered pursuant to the same licence as that for sports betting. Another form, also offered by Lotto BV, albeit subject to a different exclusive semi-permanent licence, is the instant lottery. This is defined as a lottery whereby prizes are allocated to winning tickets before sales commence. It is offered in the form of scratch cards.

An unlimited number of licences for non-incidental games of chance are available. Traditionally, only four semi-permanent licences were awarded on the basis of this provision; however, this de facto cap was successfully challenged in domestic legal proceedings, also following the *Sporting Exchange* line of reasoning. All games licensed on this basis must be for the public good, with 40 per cent of revenues going to good causes.

### **v Remote gambling**

Because of the lack of the necessary legal basis in primary legislation for the Gambling Authority to award licences for remote games of chance, there is no legal remote gambling offer in the Netherlands. See Section VIII for expectations (as of March 2020) in terms of upcoming developments on the road to opening of the remote gambling licensing regime.

### **vi Ancillary matters**

In terms of slot machines, a type approval system applies, and it is illegal for an unapproved machine to be present on the Dutch market. Different categories of machines are approved for use in Holland Casino venues, slot machine arcades, and in cafés and restaurants. The type approval system also applies for skill-gaming machines.

## **III THE LICENSING PROCESS**

### **i Application and renewal**

At the time of writing (March 2020), the new regime is expected to enter into force on 1 January 2021. While the primary legislation enabling the licensing of remote gambling is now in place, the new regime is far from complete. Although the Gambling Authority released some information on the application process in July and November 2019, the actual application form and process are not made public (see further Section VIII). Finally, business-to-business (B2B) licensing is not foreseen for the future remote gambling regime and neither is a system of personal licences.

Other than for licences for non-incidental games of chance and those required for operating slot machines, all licences are exclusive and have been awarded on a semi-permanent or permanent basis (e.g., Holland Casino). The absence of a transparent licence allocation mechanism has generated considerable case law that resulted in the *Sporting Exchange* litigation mentioned above, which itself has spurred further cases in the years after the Council of State rendered its 2011 judgment. Following the *Lottovate* decision of May 2016, a transparent

licence application procedure for non-incidental games was introduced.<sup>3</sup> Licences are available for all legal entities with their statutory seat or HQ within the EU and EEA, and are available for up to five years. After completion of the necessary licence application form, the Gambling Authority will reach a decision within eight weeks, subject to additional questions being posed to the applicant. The cost for submitting a licence application depends upon the total value of the prizes, and ranges from €226 to €2,268.

In terms of slot machine gambling, an exploitation licence, which has nationwide application, must be obtained from the Gambling Authority. A premises licence must be obtained from the relevant local municipality in which the slot machines are to be operated, in accordance with the requirements of the municipality. Exploitation licences are awarded for a period of 10 years, on the condition that the Gambling Authority is convinced of the integrity of the operator and those persons responsible for the daily operations, and the operator must also have a workshop or contract concluded with an entity that will undertake maintenance and repairs. An exploitation licence application costs €1,815, and €453 is charged annually for supervision. The Gambling Authority must reach a decision within an eight-week period.

## ii Sanctions for non-compliance

First and foremost, enforcement of the prohibitions contained within the Act occurs on the basis of administrative law by the Gambling Authority, with criminal law being turned to only in instances where administrative law enforcement has failed or when a breach of the Act is accompanied by other criminal offences. On paper, it is also feasible for consumers who have knowingly participated in unlicensed games of chance to be subject to enforcement action. Doing so amounts to a breach of the prohibition in Article 1(1)(c) of the Act, which qualifies as a minor offence and could result in a fine of up to €8,700. In contrast to some other jurisdictions, in practice, this is not made use of in the Netherlands.

Sanctions for non-compliance with Article 1(1)(a) of the Act (i.e., breaching the prohibition on offering unlicensed games of chance) and Article 1(1)(b) of the Act (i.e., breaching the prohibition on promoting unlicensed games of chance) are:

- a* Administrative fine awarded by the Gambling Authority. Fines for a breach of Article 1(1)(a) start at €200,000 and rise depending on the circumstances, in line with the Authority's policy. The maximum fine for either breach (both Article 1(1)(a) and (b)) is €870,000, or 10 per cent of the turnover during the previous year if this exceeds €870,000. Entities can also be subject to an administrative order on pain of penalty payments in case of non-compliance.
- b* Criminal sanctions (a breach of Article 1(1)(a) constitutes an 'offence' when committed with intent, and otherwise a 'minor offence'; and a breach of Article 1(1)(b) constitutes a 'minor offence'):
  - Maximum fine of €21,750 (notwithstanding imprisonment).
  - If the proceeds of the crime, or the value of the goods that were used to commit the crime, exceed one-quarter of €21,750, a maximum fine per incident of €87,000 may be imposed.
  - If the above fine is not a suitable punishment as far as it concerns legal entities, a fine of €870,000 may be imposed.

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<sup>3</sup> ECLI:NL:RBAMS:2016:3120.

Licence holders can be subject to administrative or criminal enforcement measures, and while an administrative order can be used to sanction all breaches of the Act, apart from breaches of the requirement to have a premises licence for slot machines, the Act determines per offence whether administrative or criminal sanctions are applicable.

Administrative enforcement measures are available to the Gambling Authority for a range of breaches, such as breaching licensing conditions and allowing participation by minors, and other matters including failing to abide by Article 4a of the Act, which requires licence holders to take measures to prevent 'as much as possible' addiction to the games of chance that they organise. Criminal sanctions are available when slot-machine gambling is made available without the necessary licences, or machine models are used that have not been approved by the Gambling Authority.

#### **IV WRONGDOING**

With regards to the prevention of money laundering, the Netherlands has not yet implemented the Fifth AML Directive (2018/843). The bill that will implement the Directive still has to pass Senate. Although the Senate intends to move forward with the plenary debate on the bill, the timing of this is currently unknown. Given that the Remote Gaming Act has not yet entered into force, no remote gambling operations fall within the scope of the current legislation. At present, only Holland Casino must comply with the requirements of the implementing legislation.

With regard to match-fixing, ZEBetting & Gaming Nederland BV, holder of the horse-race betting licence, is under a duty to ensure the safety and reliability of the totalisator, in particular with regard to the manipulation of events. In this regard, the operator is required to: (1) have a warning system in place to identify suspicious gambling patterns and report such occurrences to the Gambling Authority; and (2) work with other betting providers, both domestically and abroad, to combat match-fixing. The sports-betting totalisator, Lotto, is likewise required to ensure the safety and reliability of its offer, again with an eye to preventing match-fixing. However, it is subject to a different set of restrictions that prohibit it from offering bets on the outcome of amateur events, youth competitions or handicapped sports events; ban the taking of bets on penalties and sanctions; and do not allow it to offer live betting but likewise require the operator to have a warning system in place to detect suspicious gambling patterns and to report these to the Gambling Authority. Similarly, it is also required to cooperate with other providers, both domestic and those abroad, to tackle match-fixing.

Once regulatory reform has taken place, remote gambling operators will be subject to specific requirements under the revised Act.

#### **V TAXATION**

Currently, games of chance are taxed at a rate of 30.1 per cent. The tax base varies, with two distinct camps within the land-based sector. In terms of other taxes, VAT is charged at 21 per cent and corporation tax is split into two bands. Should the taxable amount (taxable profit per annum less deductible losses) be less than €200,000, a rate of 16.5 per cent will apply, while the rate will be 25 per cent for taxable amounts of €200,000 or more.

Gambling tax is based upon gross gaming revenue (GGR) for slot machines and casino gambling. It also applies, in theory, to remote gambling provided by a Netherlands-based

entity. For all other licensed offers, the prize constitutes the tax base. However, gambling tax is only due on prizes greater than €449. In practice, this pushes down the effective rate of taxation paid by some of the incumbents to single digits. However, sports and horse-race betting will see the removal of this tax-free threshold given the introduction of the remote gambling licensing regime.

Prior to 1 January 2018, the tax rate was 29 per cent. However, the delays that are still accruing surrounding the introduction of the remote gambling licensing regime entail that the state coffers have not received income in the form of tax levied on locally licensed games of chance, contrary to expectations. Therefore, the tax rate has been increased by 1.1 per cent for all current licence holders, and the rate will return to 29 per cent six months after the Remote Gambling Act enters into force. This should coincide with the issuance of the first remote gambling licences by the Gambling Authority. The tax rate for remote games of chance, to be paid by locally licensed operators, will be 29 per cent of GGR.

Following reforms in 2008, the Gaming and Betting Tax Act establishes that gaming tax is applicable on winnings from international remote gambling; players are due to pay tax, again at a rate of 30.1 per cent, on gross earnings per month from operators outside of the Netherlands. Tax due must be calculated on a monthly basis and losses cannot be offset between months. Given issues surrounding compatibility with EU law, the tax is not due on winnings from certain offerings, such as remote poker when the operator is established within the EU.

## **VI ADVERTISING AND MARKETING**

Advertising of locally unlicensed games of chance is prohibited pursuant to Article 1(1)(b) of the Act. This provision is not a dead letter; the Gambling Authority has taken enforcement action against affiliates advertising the services of remote gambling operators active on the Dutch market in breach of Article 1(1)(a) of the Act.

Article 4a of the Act provides that licence holders are required to take measures so as to prevent addiction arising through the products that they offer and to ensure that advertising activities are carried out in a careful and balanced way so that excessive participation can be avoided. This provision of the Act is fleshed out by secondary legislation, notably the Decree on Games of Chance: Recruitment, Advertising and Addiction and the similarly titled Regulation. Further provisions on advertising can be found within the Dutch Advertising Code.

## **VII YEAR IN REVIEW**

Although delays have plagued the entire reform process of the Act, to date the process has not run aground. The year 2019 finally saw the adoption of the Remote Gambling Act, and after this adoption, a lot has happened. In July 2019 the Gambling Authority published a draft policy rule, introducing a cooling-off period for business-to-consumer (B2C) operators applying for a remote gambling licence. On 3 March 2020, the Minister for Legal Protection announced that the cooling-off period will be extended to 30 months. In July and November 2019, the Gambling Authority provided a general outline of the future licensing regime. Although the information now published is not set in stone, it does give an idea of what can be expected of the licensing process.

Finally, the Gambling Authority has stirred up debate by introducing a new age verification requirement, which is added to the prioritisation criteria per 1 January 2020. Operators who fail to visibly verify the age of participants risk incurring a fine, which will also negatively impact their application for a remote gambling licence. The age verification requirement applies to those without a Dutch remote gambling licence, but with presence on the market.

## **VIII OUTLOOK**

At the time of writing, it is anticipated that reforms introduced by the Remote Gambling Act will enter into force on 1 January 2021, and that the Gambling Authority will open the licence application process on that date or shortly thereafter. The Gambling Authority will have a six-month period to assess an application, with the possibility of extending this by another six months. The second half of 2021 could very well see the first locally licensed remote gambling operations 'going live', but late 2021 will probably see the majority of operations coming online (subject to the cooling-off period).

Nevertheless, the policy rule on the cooling-off criteria (see Section I.v) still has to be finalised, and some of the technological and substantial requirements of the regulatory regime have yet to be fleshed out. Furthermore, the procedure for the secondary regulations to the Remote Gaming Act (the Decree and the Ministerial Regulation) has to be completed. While the final version of the Decree was made public on 3 March 2020, the Ministerial Regulation still only exists in draft form. The Decree will also be subject to a parliamentary scrutiny procedure. Publication of the Decree on 3 March 2020 is a positive development, which suggests that 1 January 2021 could still be feasible. However, the ensuing approach of the House of Representatives will largely determine whether the expected date for the entry into force of the Remote Gaming Act and opening of the licensing regime will be met.

Before the Remote Gaming Act and the secondary regulations enter into force, the Decree has to be sent to the Council of State, and both the Decree and the Ministerial Regulation have to be notified to the European Commission. However, at the moment it is not expected that any delays will arise from these procedural aspects.

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Dr Alan Littler advises the national and international gambling industry as a member of the gaming practice. The focus of Alan's work is for remote gambling operators and adjacent activities, such as social gaming. He also advises those providing services to the sector (e.g., payment services providers) and covers regulatory developments in the lottery and casino markets. Current interests include issues concerning data protection and privacy around gambling.

Alan has a strong academic background in European law, having been awarded his PhD from Tilburg University for research on the regulation of gambling and EU law. His research was published in *Member States versus the European Union: The Regulation of Gambling* by Martinus Nijhoff in 2011.

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