

# Netherlands: Online Gaming Act: a new monopoly and new restrictions

*By Justin Franssen and Aernout Kraaijeveld*

As well as creating a new temporary exclusive licence for state-owned operator Holland Casino, a proposed Online Gaming Act also suggested that the Ministry of Justice is to target financial institutions dealing with unlicensed remote gambling operators. Justin Franssen and Aernout Kraaijeveld, of Van Mens & Wisselink, explain how although the Ministry's initial proposals have been watered down, the proposed Act still fails to justify its restriction on the freedom to provide services.

In the political debate on the proposed Online Gaming Act, which creates a new exclusive temporary licence for remote gaming for Dutch state-owned casino monopolist Holland Casino, the enforcement of the prohibition of remote gaming is brought into focus. The Minister intends to address financial institutions licensed in the Netherlands and Internet Service Providers (ISPs), urging them to stop facilitating unlicensed remote gaming operators. On 29 January 2008, the Ministry of Justice issued a press release stating that it will 'take a firm line' against financial institutions dealing with unlicensed gaming operators. On 4 March 2008, the Minister sent a letter to the Senate which mentioned the Minister's intention to address not only financial institutions, but also ISPs.

The Ministry put together a list of 30 online operators that are aimed at the Dutch market. This list will be issued this spring to the Dutch Banking Association (NVB). The Ministry expects financial institutions to refuse clients who operate illegal remote gaming websites in the Netherlands, or foreign

remote operators targeting the Netherlands. The press release mentioned that the Ministry will take legal action against companies who 'nevertheless have relations with clients who operate illegal gaming websites in the Netherlands'. It is noteworthy that the press release was not issued by the public prosecution department, but the Ministry of Justice. The Ministry itself has no authority to indict individuals or companies, it can merely file a complaint with the public prosecution department.

In the evening of 29 January 2008, a debate on the proposed Online Gaming Act was held in the Senate. The Minister of Justice stated in this debate that the Ministry has consulted financial institutions on its intentions to combat unlicensed remote gaming operators. The Ministry expects financial institutions, such as banks and operators of online payment systems, to comply with Dutch law and stop facilitating payments to remote gaming operators. Furthermore, he stated that his statement made against the institutions was 'persuasive enough'. Senators asked if this 'firm line' includes criminal prosecution, which he promptly confirmed. However, no clear jurisprudence exists which confirms the position that facilitating payment services is illegal. In our view, it might be a misinterpretation of the 1964 Gaming Act to conclude that this Act prohibits the facilitation of payment services to online gaming operators. The Ministry based its statements on an alleged violation of Article 1 of the 1964 Gaming Act, which prohibits the offering of the opportunity to participate in games of chance without a Dutch licence and the promoting of participation in such games of chance.

These statements resulted in several critical reactions in the press from the Dutch Banking Association (NVB) and 'Currence', the operator of leading Dutch payment service provider, 'iDEAL'. A spokesman for Currence mentioned in a radio interview on 30 January 2008 that it is, in principle,

unwilling to comply with the Minister's request for as long as no judge has ruled that facilitating payment transactions to gaming operators is illegal.

The criticism from the NVB, as stated on its website, may have been effective. In his letter to the Senate of 4 March, the sharpness of the Minister's statements of 29 January was toned down. The Minister now states that only the provision of bank accounts to remote gaming operators is illegal. The Minister also acknowledges that banks cannot completely monitor or block financial transactions between Dutch residents and remote gaming operators. Dutch banks cannot prevent Dutch residents from transferring funds through a third party, such as an online bank account at a bank in another jurisdiction. The Minister explicitly mentions a PayPal account. Since PayPal has a banking licence in Luxemburg, the Ministry cannot oblige it to break up its relations with remote gaming operators.

### **The legality of facilitating payments**

In view of the legislative history of Article 1 of the 1964 Gaming Act, it is arguable that 'promoting' should be defined as: 'to induce others to participate' in games of chance. The legislative history mentions, by way of example, an intermediary that sells foreign lottery tickets in the Netherlands. It must be noted that the Ministry of Justice uses a broad interpretation of the word 'promoting' in order to also include 'facilitating transactions' between Dutch residents and remote gaming operators. To substantiate its position, the Ministry of Justice selectively cites a civil (summary) judgment by the Court of Appeal at The Hague from 19 November 1998. The Court of Appeal ruled that 'promoting', inter alia, includes advertising and facilitating the participation and the payment of the bets by the participants. However, this civil injunction judgment was given in the case of an intermediary selling tickets for German lotteries in the Netherlands, similar to the example given in parliamentary

history.

A different interpretation of the word ,promoting' can be found in a criminal judgment rendered by the Supreme Court of 23 February 1971. This case regarded the publication of winning numbers of a foreign lotto in a local Dutch newspaper. The Supreme Court ruled that all the physical acts that potential participants have to perform in order to participate in an unlicensed game of chance have to be distinguished. The Supreme Court distinguished the following acts: obtaining the lotto forms, filling in these forms, sending the forms and the wager to the foreign operator, obtaining the result of the lotto and reporting oneself to the foreign operator to collect the winnings. The local newspaper helped in obtaining the results of the game by publishing them. This publication did not contain any recommendation. According to the Supreme Court, the publishing of the results is only simplifying an already simple act (for which at least four alternatives were widely available). It cannot be considered to be promoting the participation in unlicensed games of chance.

Following the Supreme Court's rationale, the same conclusion can be made for the facilitation of payment services. Transferring funds to an operator of remote gaming is just one of several acts that an individual has to perform in order to participate in remote gaming. Since several alternatives to transferring funds directly from a Dutch bank account into the operator's bank account are available, such as through foreign online bank accounts, it is reasonable to assume that – contrary to the Minister's statements – the facilitation of payment services to remote gaming operators is not illegal under the 1964 Gaming Act.

It is noteworthy that regulations in France and Germany, with similar effects to the Minister's approach towards financial institutions, have lead to criticism from the European Commission (EC). France received a Detailed Opinion from the EC on 3 March regarding a draft decree, and Germany received a

Letter of Formal Notice on 31 January, after it implemented the Federal Inter State Gambling Treaty (IGT). The EC criticised the IGT for infringing the free movement of capital as laid down in Article 56 of the ECTreaty. It is likely that the intended Dutch enforcement of the prohibition on remote gaming will also lead to criticism, and a possible infraction procedure, from the EC. If financial institutions are prosecuted, it is possible that Dutch courts will consider this prosecution to be in violation with European law and will either acquit the financial institution, or ask preliminary questions to the European Court of Justice (ECJ) regarding the conformity of such prosecution with European law.

### **Prediction of future developments**

In its fight against remote gaming operators, the Netherlands has drafted legislation creating a monopoly on remote gaming for the state-owned casino monopolist Holland Casino, and at the same time has increased the pressure on intermediaries. The proposed legislation has already met severe criticism of its conformity with European law from the EC, the Council of State and the Senate. The main criticism is the lack of a justification for the restriction of the freedom to provide services. A vote in the Senate was planned on 5 February 2008, but in an unlikely move, the Minister asked the Senate to postpone the vote. A second debate was held on 18 March. As the proposed legislation was rejected by the Senate in a narrow vote on 1 April, it is possible that the Netherlands will avoid infringement proceedings by the EC for infringing European law. However as the Minister of Justice, Ernst Hirsch Ballin, wants to re-introduce proposals for a single online licence to be granted to Holland Casino into the Gaming Act reforms scheduled to be debated in the lower house this summer, this seems unlikely.