



DEAD ON ARRIVAL

A long read by Gaming Legal Group on the preparations of Netherlands' regulator to launch the online gambling market, in exactly one year from now. It is **not** a pretty picture.

According to the plans of the Netherlands government, new legislation that should allow online gambling in the Netherlands, should enter into force in July, 2021. This timeline is not realistic. In this *long read*, Bas Jongmans, gaming & tax attorney with Dutch Gaming Legal Group, discusses the current state of affairs of the regulatory framework for online gaming in the Netherlands. Predictions for the future are bleak.



Introductory

On February 19th, 2019, the Netherlands legislator approved the new legislation "Kansspelen op afstand" (or: "**KOA**") [1] that should enhance the current Dutch Gambling Act ("Wet op de Kansspelen", or: "**WOK**") to allow the offering of four categories of online gambling by license holders: (1) Casino games in which the players play against the license holder (e.g. roulette and blackjack); (2) Casino games in which the players play against each other (for example poker); (3) Bets on events during a sports match or on the results of a sports match; and (4) Bets on horse and "harness" racing results. [2]

Although the proposed legislation did eventually pass, it was not yet made 'active'. The exact moment of 'activation' has been left to decide by the Netherlands gambling regulator "Kansspelautoriteit". Why? Well, basically any detail of importance has been left to be completed by the Netherlands gambling regulator itself, at a to be determined time, 'somewhere' in the future. Taking a closer look at this passed legislation, it seems that the legislation that was passed, is basically just a shell, an empty hull, full of so-called 'open norms', which is disconcerting.

Traditionally, for the purpose of protection of its participants, a gambling market is strictly controlled.

This is being done for good reason, as participants could develop all sorts of problematic behavior. End users (players) who are not offered boundaries, could develop gambling addiction. However, operators can develop problematic behavior as well. If the regulatory framework does not provide sufficient clarity on what is allowed and what is not, it could lead to unfair and ambiguous products and services. If the framework cannot be properly enforced, it could lead to downright scamming.

Hence, there should be no place for ambiguity in the world of gambling. The legislator should always decide for itself on how to arrange for products and services that can potentially be harmful to the public. With for the market for cigarettes and alcohol, this is no different. There are many reasons, why the legislator should never abandon its responsibility to strictly control potentially harmful products and services. If things get too complicated, and as a result, the legislator is not up to the task, then it should not elect to open up the market. That governments nevertheless feel pressured to allow online gambling is mainly a matter of coin, which has been one of the primary reasons that EU Member States were never able to find common ground for a European gambling directive, as was the case with the Markets in Financial Instruments Directive ("**MiFID**").

Once having been granted a financial license by any regulator within the EU,

under MiFID, the "European Passport" of the licensee allows to offer services within the full EU internal market. [3]

Governments, however, do not like to give up control over 'their' part of the internal market [4] and so far, EU Member States have been allowed by the EU Court to retain such control.

Although this is not in line with the principle of having a common internal market within the EU and is even deemed to contravene the EU Freedoms, exceptions are allowed for products and services that may be potentially hazardous to the population. This has resulted in each EU Member state trying to develop a regulatory framework for itself.

This is clearly unsustainable as there cannot be 27 licensing procedures within the EU, for a global online market and puts great pressure on the matter of enforceability of those local frameworks as well.

Drafting a regulatory framework for online gambling is indeed complicated. Many aspects need to be considered, most of them technical issues, for which specific knowledge in this field is required and this knowledge does not seem sufficiently available within the scope of the Netherlands legislator at this time.

If the legislative process is not handled seriously, it shall therefore indeed have 'open norms'. As a consequence, this will invite ambiguity and lack of

transparency in for example the license application process and people could get hurt. Players as well as operators. In the end, confusion and ambiguity would burden the courts as they would be tasked with completing the open norms with case law. This is never ideal. It would be a costly, sloppy and most of all, time consuming affair.

ECHR

For example, in 2007, a matter of budget caused the Netherlands government to rapidly decide on the introduction of a gaming tax on (land-based) slot machines. [5] Important details of this new gaming tax were left to the Netherlands Tax and Customs Administration, which resulted in extensive litigation as the policies that were developed were ambiguous to say the least and subject to constant change. Thirteen years later, this litigation - the operators are represented by yours truly - is still ongoing and have several courts ruled that the legislation has resulted in nothing less than violations of human rights as codified in the first Protocol with the European Convention on Human Rights ("ECHR"). The matter is up for appeal by operators as well as the Netherlands government with the Netherlands Supreme Court for the third time [6] and all of the referral courts have been 'used' up as the Supreme Court has been referring and referring.

The lesson learnt from this should be that open norms in strictly controlled markets should be prevented as much as possible. Especially since, in the Netherlands, there is no possibility to bring gaming *licensing* matters before the Netherlands Supreme Court. One could safely say that if legislation is finding basic human rights on its path, it must mean that it is bad, very bad legislation.

The timeline is not realistic

Is the claim of *Kansspelautoriteit* realistic, that the online regulatory framework shall be launched - this time apparently for real - as of mid-2021? Absolutely not. For several reasons. Firstly, because of the signals of the regulator itself. Secondly, because the process has already seen a staggering number of delays. Thirdly, due to the complexity of it all.

The regulator itself has signaled that it is not ready

Several board members of *Kansspelautoriteit* have voiced their concerns [7] that the legislative process was stuck and not moving forward. One after the other resigned. The comments of Marja Appelman, former director of *Kansspelautoriteit* when finally parting

with the regulator in July 2018, commending herself on a 'job well done', say it all:

"It has been [...] frustrating but interesting. [...] An organization had to be built and monitored, while budgets and schedules had to be constantly updated. And it was important that our colleagues remained motivated, despite the postponement." [...] The gambling market - although a lot of money involved - is relatively small, it is complex and technical matter" [...]. [8]

And then there is the whopping defeat of *Kansspelautoriteit* in the matter of payment provider CURO Payments ("**Curo**"). The regulator had imposed an order for incremental penalty payments on that company for providing payment services to (allegedly) illegal operators. The matter was brought before the Administrative Jurisdiction Division (the: "**Division**") of the Council of State, which is the highest general administrative court in the Netherlands.

Appelman: "It has been frustrating but interesting."

Kansspelautoriteit took the legal position that the provision of payment services is an indispensable part of the gaming operation. It therefore should be equally enforceable. After all, claimed *Kansspelautoriteit*: *"if there is no payment, no play is possible."*

The Division would not have it: *"The current law does not state accurately, clearly and unambiguously, that the provision of payment services falls under the promotion of gambling."* [9]

Of course. Which boundaries would else remain standing? Will the local telephone company be held complicit as well by offering phone lines to customer services?

Although it resulted in a legal defeat, Appelman did not regret the attempt to tackle payment service provider Curo, announcing in her parting interview that the new legislation would easily 'fix' this matter. In other words, *Kansspelautoriteit* did not really cross any legal boundaries by chasing this company. It was in the view of Appelman nearly a technicality. Going even one step further, Appelman de facto admits in this interview that *Kansspelautoriteit*, although not having the means to follow the proper legal procedures, just *"had to try"* to take down this payment provider: *"With the limited resources we have, we had to try this. No pay, no play."* [10] Wow. This does not paint a pretty picture of the moral compass of this regulator.

Willing, apparently, while already frustrated within its ranks, to just move forward and chase anyone, if it feels that some higher goal would demand it. One can only imagine the *naming and shaming* by *Kansspelautoriteit*, that this provider had to endure.

After the proposed legislation had finally passed, *Kansspelautoriteit* started voicing very different concerns, namely that it was not yet ready to proceed. It was still working on these 'lower' regulations, that it was instructed to produce. [11]

For the record, the 'easy fix to the Curo problem', as Appelman described it, has not been included in the new legislation. It seems that way, but it has not. To prevent that this long-read will even read longer, I will devote a separate article to the technicalities of the new legislation.

A history of delays

The process of introducing a regulatory framework to support online gambling in the Netherlands is entering year fifteen. All this time, legislators and policymakers have remained hopelessly divided. The first attempt to regulate online gambling in the Netherlands, dates back to 2007.

It was a different time. Just prior to the introduction of the very first *iPhone*. The debate started even two year before. In 2005 it was proposed to, as an experiment, provide the (state-owned) land-based monopolist *Holland Casino* with the opportunity to offer remote games of chance.

The legislator however reconsidered, as it was feared that legalizing online gambling would potentially stimulate gambling addiction. This fear, combined with the view at the time that offering games of chance via the internet should not be a government task, led to the Senate ultimately referring that proposal to the bin. [12]

More than ten years passed before the House of Representatives debated a first version of KOA, that was introduced on July 18th, 2014 and passed in the House of Representatives on July 7th, 2016. [13]

It met obstacle after obstacle, until it was passed by the Senate, nearly six years later, in 2019 with all of its flaws, 'as is', leaving it for *Kansspelautoriteit* to bring it to full completion in a matter of months, which of course is not realistic. Keep in mind that this proposal was hatched, as said, prior to the first *iPhone*! That should provide the reader with some hints, whether this legislation is up-to-date, it is built to accommodate and withstand today's technological challenges. It is not.

Complexity

When opening up a new online market, there are many matters to be attended to. It is not only the matter of arranging the proper technical requirements and connected regulatory oversight. There, for example, is also the matter of taxation. In another contribution, I have discussed a proposal of the government to temporarily increase the rate of 29% for gambling tax by 1.1% to 30.1% [14] to provide compensation for the treasury as a result of missed gaming taxes. Since the original deadline, set by the government itself, was not met, for which the government itself was to blame, compensation was sought with the traditional, land-based operators. [15] Rolling back this 'temporary' tax increase was made conditional on a downright uncertain event, namely the moment that the 'online' legislation would enter into force. Of course, it was already completely evident that the - at that time anticipated - deadline of 1 July 2018 would not be met. That prediction came true. One year later, that 'temporary' increase seems to have become a de facto permanent increase for the land-based operators, who are not even involved in the online application process. This is just one example of the government veering of course. There are many.

Appelman: "With the limited resources we have, we had to try this. No pay, no play."

Even if the legal framework would be completed before within the designated time-frame (mid-2021), it is still not clear how 'flanking policies' shall be dealt with, such as however not limited to the matter of taxation.

However, even the completion of the 'main' legal framework within the designated timeline does not seem likely, as this should be an extensive process of trial and error, while the regulator seems stuck in a continuous process of collecting experiences and information from operators. We see convention after convention in which Kansspelautoriteit invites participants to share their thoughts, to make known their interest in the application process. [16] In other words: it has not even started.

Ballpark Modules

The information that the regulator has produced until now regarding the application process, does not seem to be very encouraging. The regulator has

formulated several 'ballpark' modules that would be of interest in the application process. [17] I will briefly describe these modules below.

The first *module A* establishes the category of games of chance for the application. Apparently, there shall be four different application processes. This seems utterly impossible, as it would, at best, already from the start *quadruple* the procedures for the application process. In addition, this module shall inquire to decide on the legal form of the applicant, is it for example stock exchange listed? No hint whatsoever has been provided on what the regulator would require from the applicant. Shall there for example be the need for an increased share capital? Should there be a local presence within the Netherlands? What about ramifications for taxation, other than gaming tax purposes. Should there be a local representation for corporate income tax purposes? What would be the requirements for this? Will there be coordination with the Netherlands Tax and Customs Administration?

Module B would concern itself with the so-called "*integrity*" of the applicant, the entity, its employees and its business relationships? Applicants are subject to a test in the context of the Promotion of Integrity Assessments Act by the public administration ("**Bibob**"). In this module, information is asked about assets, debts, involvement with other companies, group structures, organizational charts, criminal records. Again, in order to limit the length of this article, I shall devote a separate article on how this integrity check is being performed. I will for now suffice with the conclusion that the process is ambiguous, costly and extremely time-consuming for both the applicant as well as the regulator. The regulator has complained many times in the past that it does not (even) have the capacity to properly the market against illegal operators. [18] Even if the budget would be there to expand the capacity of the regulator, it shall also take a lot

of time to actually expand it, to find a 'fit-and-proper', multidisciplinary staff that is up to the task.

The alternative would be that the application procedure would drag on forever. This is from an AML-perspective however not an option, as Know-Your-Customer ("**KYC**") documentation should be refreshed at the latest three months after they have been filed. I have only mentioned the processing of this information from the 'integrity-test' perspective.

I have not even touched on the necessity for reviewing it from a technical perspective, the inner workings of intercompany relationships (payment processors, affiliates, license holder). It is a very, very big job, if done properly. Fears are, because of all of the above, that it will not be done properly.

In Module C, the applicant must demonstrate that the policymakers and senior officials have sufficient expertise and that the expertise is guaranteed within the company. The personnel and training policies are for example reviewed in this module.

What kind of expertise? In responsible gaming? AML? Financial? Legal? Who would be testing the applicants and how? Perhaps more important, when? A so-called "*gated*" testing, at the moment of the application, is hardly going to provide the necessary information. What if the individual that initially did pass the tests of the regulator leaves after two months?

What happens if the individual at some point falls out of good standing? What if this would only *appear* to be the case? How shall the regulator decide? Will the license be suspended? If so, what would be the effective remedy against this? Will there be ramifications for tax purposes. Referring to a review of proposed tax legislation in light of the online market opening up: yes, there will be and it shall not be pretty.



The proposed Tax Collective Act 2021 includes several provisions to extend the group of tax payers for the gaming tax. I have discussed these in a separate contribution. [19]

Module D focuses on the aspects of financial management. The applicant's financial management is discussed in this module. How are player credits protected? How is the continuity of the company guaranteed? In this context, a financial guarantee of an (expected) € 830,000 is also being requested. This is to ensure that taxes, gambling fees and any fines can be paid. Will the regulator be holding these deposits for safekeeping? Will it be paying interest? How will the regulator itself deal with AML-requirements? What would happen if it grants a license to a specific applicant, that in time turns out not to have been 'fit-and-proper', which would make the deposit potentially tainted? Without proper procedures, the regulator itself could become a victim of money laundering operations. Why would the regulator have a different position than a bank? Besides the matter of providing guarantees, also the financial expertise of the individuals connected to the applicant should be tested on a continuous basis, as well as who has specific access to funds. The regulator should also be obliged to review prior financial statements of the applicant. It can for obvious reasons not suffice with just a statement of an accountant.

The process is ambiguous, costly and extremely time-consuming for both the applicant as well as the regulator

Module E deals with marketing and advertising, information and provision of information, complaint handling, addiction prevention and player identification. It is meant to provide insight into the policies of the applicant, how the processes are monitored, what is happening in risk management and how any errors are corrected and prevented in the future. Basically, with this module the regulator aims to review the general 'future' of the company. It shall require a business plan. Not a general one, but a bundle of specific manuals on how addiction prevention and player identification should be handled. A professional applicant can indeed be expected to be able to provide this information. However, who is going to review all of this data? If the application process would open up one year from now, at least some of the required procedures should be available by now.

Module F would aim at guarding the quality of the operation by collecting information on and monitoring and error reporting, for example in relation to the processing of payment transactions. Would these procedures be designed from scratch? Will also third parties that are handling transactions be subject to these procedures?

I remind the reader to the horror story of the Curo case, earlier in this article. What about the ICT environment of the structure? Same story. How shall the regulator be handling the extremely large data flow that shall be produced by operators? No hints on this so far.

Last, Module G would require the applicant to demonstrate that it shall be able to connect to as system, called, Central Register for the Exclusion of Games of Chance ("Cruks") as well as the Control Database ("CDB"). The regulator will have full continued access to the applicant's data, which shall be personal data as meant in the General Data Protection Regulation ("GDPR"). [20]

How will the regulator handle the very large responsibility in full compliance with the GDPR? Does it employ GDPR-specialists, equipped to handle these large volumes of personal information? What happens if something goes wrong with this information? Will the regulator report data leaks? Could penalties in accordance with the GDPR be imposed to the regulator?



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Not even the technical conditions for these systems Cruks and the CDB have been published at this time. The regulator has actively communicated that these requirements shall however become known, no later than three months before the applications can be submitted. Will the regulator itself be designing these procedures? Who will be involved? At best, there is only nine months left to present these procedures in connection with two extremely complicated and large databases.

The track-record of the government of the Netherlands in the field of development of data-technology has not been great so far. It is for example still trying to introduce a limited COVID-19 application, for which the decision was made to cooperate with a private, third party. This backfired, as the technology already in its first test phase leaked large amount of personal data to the public internet environment.

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Government officials defended themselves by claiming that these mistakes only happen when there is pressure to perform. The challenges ahead seem significant to me. The government, by its own accord, has 9 months to come up with a plan for integration of Cruks and CDB.

Willingness of the market to accept regulations are under these circumstances doubtful

Several liberal members of Netherlands' House of Representatives as well as the Senate have voiced their concern over the potential reinforcing effects of illegal gaming behavior (the so-called "degree of channeling" or in Dutch: "kanalisatiegraad"). [21] The government did not share this concern at the time. Operators would not be attempting to increase the tax increase to the players.

Also not helping, is another proposal from the government to make providers of land-based sports betting severally liable for the gaming tax, payable by players. The new amendments in taxation are being proposed under the claim that the government is making sure that all types of games of chance shall be treated equally for tax purposes. That does not seem to be a sincere claim, as it is obvious that the changes have

been tailored to further consolidate and guarantee the levy and collecting of gaming tax. Yet another proposal, to make the operator the primary taxpayer for gaming tax altogether, makes this even further evident. [22]

It is also not in line with the well-voiced principle in parliamentary discussions that the levy of gaming tax is also meant to mitigate unwanted and excessive playing behavior, an important aim of the gaming tax is to 'slow players down' so to speak. By removing gaming taxation on player level, this principle would be abolished, which would be a very bad idea. After all, illegal operators do not have to bother players with any matters of taxation. Although illegal operations are taxable in principle, in practice it is not. A 'win-win' situation for illegal providers and its participants so to speak and thus a very bad and thoughtless idea.

The willingness of the market to accept the new regulations was already not ideal. By proposing to add even new measures that are unfavorable to operators, it is expected that such level of acceptance shall be significantly lowered even further. Illegal operators might in the end not elect to legally participate, at all.

Online Promotional Games of Chance: sleight of hand

In yet another proposal, online promotional games of chance would not be regarded as being offered online. That does not seem to make any sense, however it would be the only way, technically for the government, to introduce taxation on this category of games of chance. The proposal boils down to the fact that if games of chance are played via the internet, we will be pretending for tax purposes that they will not be played via the internet.

I do not see how the proposed framework will be able to compete within a European constellation

If it serves its purpose, the Netherlands government is willing to call a dog a cat, so to speak. This will not enhance the quality of any regulatory framework and will, in time, only backfire. Sooner or later, the dog that has for tax purposes been conveniently qualified as a cat, should for other purposes be requalified as a dog again.

Dead on arrival

Making distinctions between online gaming and land-based gaming, in time, will prove not to be sustainable, as the internet is only just one more way of communicating. In essence it does not differ from other methods of communications that were once regarded as state of the art (phone, telex, facsimile). With the 'next thing' also the internet as we know it will become a thing of the past, sooner or later. Ergo, taxation as well as licensing, should not be connected to methods of communication as this is at some point is doomed to fail. How unfortunate it is that such distinction (online or offline) has become the centerpiece of the regulatory framework in the Netherlands for online gambling, as it was designed twelve years ago, which was a very different time and the internet might still have felt relatively new to some of us.

I do not see how the proposed framework will be able to compete within a European constellation. For example, in 2018, Malta has executed an impressive overhaul of all gambling legislation, based on the assumption that distinction in distribution channels (online v offline) is becoming less important as these channels are increasingly converging.

Tax rates are for too high, demands for investments are outdated and unrealistic

When the novelty of a communication medium is "finished", history learns, it loses its distinctive characteristics. There is also no mention of games of chance via telex, fax or telephone and it is therefore foreseeable that if the new regulatory bill in the Netherlands shall every been put into practice - with the emphasis on 'if' - it will be 'dead on arrival', as at that moment it will have become so outdated, up to the point that it will have become unmanageable for providers [23].

Tax rates are for too high, demands for investments are outdated and unrealistic. Last but not least, the legal exposure in combination with an almost non-existent incentive for illegal operators to voluntarily enter the legal market and comply with all that would be asked from them to legally participate, does not seem to be worth the trouble.

It makes the regulatory framework in my opinion 'dead on arrival' and if the framework would be introduced at all,

chances are that it will be rapidly monopolized by a small conglomerate of private operators and their suppliers.

This would allow the Netherlands gambling regulator to just outsource the extremely large and ambitious agenda that it has onboarded, unsustainable as is for so many reasons: no budget, no capacity, no experience. A system of 'sublicensing', *certification by the initially certified*, would organically develop, which happens whenever a government is not up to the task. This, interestingly enough, would be in line with how the regulatory framework for online gambling in Curaçao has developed itself over time. [24]

Endnotes

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