

Offering illegal online games of chance within the Netherlands

Court holds illegal operator does not have to repay losses

On 18 March, the District Court of Amsterdam held that online gambling operators have no responsibility to refund a gambler's losses, even if the operator lacks an online gambling licence. As a result, Unibet did not have to refund €178,000 of gambling losses. The decision has prompted Dutch parliamentary questions as to whether the required licence under the upcoming Dutch gambling legislation will be meaningless.

Background of Dutch Betting and Gaming Act

The current Betting and Gaming Act prohibits the organisation of online games of chance, so it is currently not possible to obtain a licence for the organisation of such games. Modernisation was, therefore, necessary. To this end, an Online Gambling Bill was submitted to the Lower House of Parliament in July 2014. It enables the provision of online games of chance in the Netherlands, provided that a licence has been obtained. In the meantime, offering online games of chance within the Netherlands remains illegal. The Dutch Gambling Authority ('KSA') is responsible for *inter alia* combatting the providers of illegal gambling. In doing so, it is focusing on providers that prominently target the Dutch market. The KSA applies three criteria to assess whether the provider is targeting the Dutch market: (i) is the provider using a .nl website; (ii) are the offers made in the Dutch language; or (iii) is the provider advertising on Dutch radio, television and in print media ('the priority criteria'). The KSA will take action against those providers who are caught by the priority criteria.

Ruling of Dutch District Court of Amsterdam

During proceedings before the District Court of Amsterdam, a player claimed that Unibet had to repay €178,088.50¹ in gambling losses. The player argued that Unibet acted in violation of the Dutch Betting and Gaming Act, by providing online games of chance on the Dutch market. As a result, the gambling agreement between Unibet and the player should be declared void, the player argued. The Court concluded that Unibet indeed offered online games of chance illegally on the Dutch market. According to the Court, the website was directed at players within the Netherlands, as the website had an .nl-extension, the operator had advertisements in Dutch, a Dutch bank account and even Dutch customer services. The next question is, however, whether this implies that the agreement between Unibet and the player must be declared void.

Dutch law states that an agreement can be declared void if the agreement is a violation of a statutory provision. The Court, however, ruled that Dutch society no longer views online gambling as a socially undesirable or illegal activity, and thus the lack of a Dutch licence was insufficient to void the player's contract with Unibet. To this end, the Court also found relevant that the government tolerates illegal games of chance (Unibet presented a letter in which the KSA committed to not taking

any action against Unibet) and that the Netherlands is currently in a transition phase, awaiting new legislation which allows online games of chance. The player also argued that Unibet violated its duty of care towards the player, as it did not intervene in the player's gambling behaviour. The Court held that Unibet is subject to a duty of care towards its players. This duty includes *inter alia* the responsibility to prevent gambling addiction and problem gambling. The Court considered that in a period of around 18 months the applicant played very frequently on the Unibet website and lost more than €178,000. The player did not make use of any of the safeguards and preventions on the Unibet website to set limits. Finally, the player did not show signs of problematic gaming behaviour. The Court, therefore, concluded that there was no duty upon Unibet to interfere. Consequently, Unibet had not breached its duty of care and does not have to repay the gambling losses.

Consequences of the ruling for the future

Parliamentarians have asked questions about whether the judgment implies that an application for a licence under the upcoming legislation will be meaningless, since providers can apparently offer games of chance illegally. Although answering this question has been postponed, the Minister has indicated in response to a previous resolution of Parliament that operators that have received a fine from the KSA since 2011 will not be eligible for a licence after the opening of the market². Since 2011, seven operators have been fined by the KSA³. Moreover, a licence can be denied in cases where it is clear that the operator offered games of chance illegally on the Dutch market, but has not been fined yet. There is, however, no obligation on the KSA to deny a licence in those cases. The KSA will have to consider whether it believes that a particular operator is able to offer games of chance in a responsible and reliable manner⁴.

It is expected that the KSA will assess in a very strict manner whether an operator is eligible for a licence. As a consequence, operators that illegally offer online games of chance might not be fined by the KSA, and might not have to repay gambling losses, but their behaviour might have consequences for a possible application for a licence in the very near future!

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1. Dutch District Court of Amsterdam, 18 March 2015, ECLI:NL:RBAMS:2015:1452.

2. Lower House, 2014/15, 33996, nr. 6, p. 57. This is a response to the resolution: Lower House, 2010/11, 32264, nr. 19. See letter of the Minister of Security and Justice of 14 April 2014.

3. Globalstars N.V., Onisac Limited & Mansion Casino Online Limited, Imperial E-Club Limited, Redcorp S.A., Bluemay Enterprises N.V., Bluemay Enterprises Limited and Co-Gaming Limited.

4. Lower House, 2014/15, 33996, nr. 6, p. 57.