

Formal annotation on the Opinion of the Attorney-General with the Supreme Court of the Netherlands in the matter of PokerStars, concerning the levy of Netherlands Gaming Tax on Internet Poker Winnings

The Attorney-General with the Supreme Court of the Netherlands, Ettema, has produced a Joint Annex to six conclusions on gambling tax matters (cases with number 19/00769, 19/00771, 19/00772, 19/00773, 19/00778, 19/2013). In those matters the question is whether the freedom of services (Article 56 et seq. TFEU) is subject to the levy of Netherlands gambling tax on Internet Poker Winnings. This depends on whether the "Holder" of the relevant internet games of chance is located in the EU or abroad.

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Official Annotator

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A Summary of the Generic Material Aspects of the PokerStars Cases

The generic dispute in the cases is whether the holder of poker games played through the *PokerStars.eu* website is located in the EU (Malta) or outside (the Isle of Man) and how the burden of proof should be shared in this respect. If the holder is established in Malta, the taxation of games of chance tax under the current legislation of X (interested party) is contrary to the EU's freedom to provide services.

According to the Den Bosch Referral Court (the "**Referral Court**"), X (the end user) has the burden of proof to demonstrate that the holder of the game of chance is located in Malta. Given the nature of online poker games, the A-G feels that the location of the so-called "*initiator*" of the game of chance should be leading, who would therefore also be the organizer in the view of the Referral Court.

The Referral Court deems it plausible that the company in Malta, *Rationale Gaming*, has assumed the de facto organization of the game of chance with respect to the end users of the said website in the Netherlands and it has done so under its own entity name and under its own responsibility. It should therefore be regarded as the "*holder*" of the game of chance as well. It then follows, in the view of the Referral Court, that levying a gambling tax on the results achieved via *PokerStars.eu* would be in violation of Article 57 of the Treaty on the Functioning of the European Union ("**TFEU**") and should therefore be omitted.

The Undersecretary of Finance of the government of the Netherlands has appealed the said ruling of the Referral Court. The A-G feels that such an appeal is well-founded. The A-G concludes in legal consideration 4.10 of the Joint Annex, that the entity that is making the key strategic decisions should be deemed the holder of the game of chance. The Referral Court, as said, is of a different opinion as it has elected to introduce the (sub)criterion of the "*initiator*". The A-G has concluded that she cannot determine

whether the Referral Court has verified whether this “initiator” indeed makes the most important strategic decisions of the game of chance, ultimately played via the *PokerStars.eu* website. Therefore, the A-G concludes that the case should be referred by the Supreme Court, yet again.

The A-G deems the (conditional) incidental appeal well-founded as well. In legal consideration 5.10 of the Joint Annex, the A-G concludes that the burden of proof that the taxation of games of chance in respect of a foreign internet game of chance does not infringe the freedom to provide services should be borne by the Inspector, not the end user.

Fractal

In this joint annex (the: “**Joint Annex**”), Attorney-General (“**A-G**”) with the Supreme Court of the Netherlands, Ettema, concludes that in order to answer the question of where the “holder” of internet gambling games formulated by the Supreme Court is located, it is necessary to consider who has control over the organization of an internet gambling game. In my note with the referring judgement of the Supreme Court in case number 17/02691, to date March 16th, 2018 [1] I have voiced my opinion that the Supreme Court has asked the Referral Court the impossible.

The Referral Court had to determine *the “holder”* of the game of chance. However, the meaning of the definition of “holder” was not specified, other than that the ownership and organization of the game of chance is not the same. In the matter of the judgment of the Referral Court [2], I have added in my formal opinion that, as expected, the Court did indeed experience difficulty in finding that holder.

The Court elected to designate the “*initiator*” of the game of chance as the holder. According to the Court, the initiator must be seen as the person who has taken on the organization to make the game possible for Dutch players. This therefore concerns the actual organizer, which is independent of the central legal consideration of business, from which it follows that according to there can therefore also be different types of organizers.

The A-G rightly argues in legal consideration 4.2 of the Joint Annex that the Court has wrongly introduced a new (sub) criterion. She noticed in this respect, she explains in legal consideration 4.1 of the Joint annex, that initially, other courts erroneously tried to determine a location where the online poker game takes were deemed to physically have taken place. In accordance with the criterion formulated by the Supreme Court, however, it does not matter where the game of chance actually takes place. The legal consideration is, says the A-G, where the organizer, that is to say the person who has control over the organization of the game of chance, is located. In this, she states, in so many words, that the organizer of the organization in this context must be regarded as the organizer.

It is not clear to me on what grounds the A-G came to that conclusion. The Supreme Court has ruled that it should not matter, who the organizer of the game of chance is. It follows that it is therefore also not relevant who the “*organizer of the organization*” should be, as this, equally to “*initiator*” would introduce yet another sub-criterion. Moreover, that criterion would also not be very useful as in online gaming, there

is rarely one single organizer, which has also been the viewpoint of the Appeals Court of Arnhem-Leeuwarden in its ruling of April 25th, 2017 :

"Games of chance require game rules. When multiple organizers are involved decision-making and coordination is necessary for organizing international tournaments and cash games." [3]

The A-G herself states in so many words in legal consideration 4.6 that there may be a number of organizers:

"All companies within the group that are responsible for a part of the organization of the internet gambling game."

It becomes even more complicated with the observation that important policymaking, but also policy implementation, does not necessarily take place within one's own structure. An example. A specific organization that determines the payout policy of a game of chance directs various teams of persons who determine per player whether payouts are made and if so, depending on what conditions. This service is typically referred to as *"payment processing"*. Sometimes the payment processor is part of the structure, of the gaming company, sometimes an external, unaffiliated solution has been sought for that functionality, sometimes both. It cannot be ruled out that those who make decisions about payouts in this regard, one of the 'key' parts of the game of chance, are not themselves part of the gaming structure itself, are not even associated with the entity that is economically responsible for the game of chance itself. And this is just one of the lesser complicated examples. The introduction of the first so-called *"provably fair"* games of chance is already a fact. These are games of chance in which the entire implementation, without any human factor, takes place by means of a *"blockchain"*.

However, a typical game of chance has many more organization 'hubs'. For example, who makes the decisions about voluntary exclusion of addicted players (self-exclusion)? At what location are matters of complaint handling executed? Where are the bank accounts with the players' deposits held? It should then have to be considered how important each organization 'hub' is for the continuity of the game of chance. That is undoable. Should then perhaps the leading criterion be, the company that directly concludes gaming agreements with the end user? The A-G mentions this an important criterion in legal consideration 4.6 of the Joint Annex. In legal consideration 4.9 she states that if more companies within the group should be able to exercise joint control over the organization of the online poker game, it would be obvious that these companies would in any case also include the company that concludes agreements with players and this entity would also have the necessary permits to do so. The question is, however, whether it can be assumed that this is obvious. For example, what about the so-called 'white-labeling' in which the manager of a specific website uses the technical services of a much larger, professional organizer, which functions under the license of that organizer and subsequently the profit (a *"revenue share"*) is paid? The A-G states in so many words that one should look for the *"main organizer"*. That would be the organizer of the organizer of the organization? It is reminiscent of a fractal and so one could go on and on discussing which entity would be mainly responsible. Let alone that such consideration would go against the judgment of the Supreme Court, that 'the' (singular) organization of the game of chance cannot be deemed a criterion in this perspective.

Follow the Money

What should be the starting point here? How can the deadlock in these six tax cases be broken? The problem arises that, due to the rapid development of technology, the organization of virtual services, such as games of chance, is becoming too complex for current fiscal standards to cope with. The modern game of chance can be compared to a virtual department store, a virtual airport, where a flurry of different parties come and go, are involved, interacting in a complex process. Where the sum is more than the equal of its parts. Only some of those parts are attributable to the organization of that organization, as the A-G calls it. When they do, a tax can be imposed, such as an airport tax. A generally limited tax that is only intended to combat the costs for the joint organization only (safety, parking, landing rights). How does that work out in a virtual environment? In such a complex setting, only a single classic remedy works: "*follow the money*". Find the intersection where all payments come together. After all, someone has to pay for all of these services, with payments coming from capital raised by players, who have lost their stake. It will be very complex to prevent those cash flows from intersecting somewhere. Only there will the organizer of the organizer be found that the A-G is searching for and, moreover, it will immediately become clear where the focus of the structure should be for AML purposes. This solution is also "*crypto-proof*" at the same time. My advice would therefore be: follow the rainbow and find the pot of gold. [BJ]*

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Endnotes

[1] Supreme Court (HR) March 16th, 2018, 17/02691, ECLI:NL:HR:2018:356, NLF 2018/0703, with official annotation of Bas Jongmans, Esq.

[2] Referral Court (Hof) Den Bosch, December 31st, 2018, 18/00139, ECLI:NL:GHSHE:2018:5297, NLF 2019/0194, with official annotation of Bas Jongmans, Esq.

[3] With reference to legal consideration 4.6 of the Appeals Court Arnhem-Leeuwarden to date April, 25th, 2017, 16/00094, ECLI:NL:GHARL:2017:3534, NLF 2017/1357, with official annotation of D.G. Barmiento, Esq.

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