



Gambling Act 2005

Has the UK played its cards right?

Alarna Carlsson-Sweeny of **PLC** discusses whether the Gambling Act 2005 will fulfill its promise when it comes fully into force on 1 September 2007 with **John Hagan** and **Julian Harris** of **Harris Hagan** and **Carl Rohsler** of **Hammonds**.

The Gambling Act 2005 allows remote-gaming operators to set up operations in the UK for the first time through a regulated-licensing regime. This article discusses how the significance of the regulations may be diminished by the 15% remote-gaming duty, stringent licensing requirements, and the uncertainty created by the government's recent policy shift on the proposed relaxation of gambling advertising laws. It argues that these factors have created a disincentive for remote gambling operators to move to the UK, and that, as a leading practitioner in gambling law puts it in this article, "we are facing a situation where a lot of the hard work that was done to establish the UK as a well-regulated but attractive remote gambling jurisdiction is being effectively undone".

The Gambling Act 2005 (the 2005 Act), which comes fully into force on 1 September 2007, introduces a licensing system to regulate all forms of gambling, including remote gambling (that is, gambling using the internet or other remote communication) (*see box, Gambling Act 2005*).

Among other things, the 2005 Act rectifies an anomaly in the current treatment of remote gambling. Under the current regime, remote-betting operators (those that accept bets remotely) can operate in the UK under the same rules as bricks-

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The Gambling Act 2005 (the 2005 Act), which comes fully into force on 1 September 2007, will consolidate all the existing, piecemeal gambling legislation and govern all forms of gambling, including betting, gaming and lotteries (with the exception of betting on financial instruments and the National Lottery).

The 2005 Act established a single regulator, the Gambling Commission, to oversee the whole gambling industry (*section 20, 2005 Act*).

The 2005 Act put in place a framework for the regulation of gambling in the UK through a licensing system and, among other things, makes it an offence to do the following things without an appropriate licence, permit or registration:

- Provide facilities for gambling (*section 33, 2005 Act*).
- Use premises for gambling (*section 37, 2005 Act*).

(For background on the 2005 Act, see *Focus, Gambling Act 2005: a brave new world?*, www.practicallaw.com/7-201-4799.)

and-mortar bookmakers. However, remote-gaming operators (those that provide the opportunity to play games of chance for prizes remotely) cannot operate in the UK, even though people in the UK can lawfully play on gaming websites operated offshore, and around 6% of British residents already do so regularly (*Gambling Commission*).

The Government hoped that the changes the 2005 Act makes would encourage

offshore companies to move their online-gaming operations to the UK and so bring them within the ambit of British regulation. The 2005 Act was intended to be a model for the rest of the world in terms of socially responsible regulation of the rapidly-growing remote-gambling industry (according to one forecast by Dresdner Kleinwort Wasserstein, the global-internet-gambling market is growing at 22% a year (*The Business of Gambling, 2005*)).

However, these intentions may have been undermined by a recent shift in government policy, illustrated by the setting of the new remote gaming duty at a level the industry says is too high, and the announcement of a review of the provisions in the 2005 Act that relax existing advertising laws.

"We are facing a situation where a lot of the hard work that was done to establish the UK as a well-regulated but attractive remote-gambling jurisdiction is being effectively undone," says John Hagan, a partner at Harris Hagan. "Remote gambling operators are uncertain about the government's current policy towards the 2005 Act, and have been discouraged from moving operations to the UK."

Remote gaming duty set too high

As remote-gaming operators have not previously been able to set up operations in the UK, remote gaming has, until now, been outside the scope of the gambling tax regime.

In the 2005 Pre-Budget Report, it was announced that remote gaming would be brought within the scope of existing gaming taxation. However, following a period of consultation, HM Revenue & Customs (HMRC) announced in February 2007 that it would introduce a new tax, remote-gaming duty, to be charged on the provision of facilities for remote gaming (*see Legal update, Revenue publishes details of remote gaming duty, www.practicallaw.com/8-217-4966*). Other forms of gambling in the UK are already subject to similar duties.

Remote-gaming duty will be calculated as a percentage of remote-gaming profits (that is, stakes received, and participation fees paid, less the value of prizes provided by the operator). It will be payable in addition to corporation tax, though remote-gaming participation charges are exempt from VAT.

In the 2007 Budget, HM Treasury announced that remote-gaming duty would be set at 15%, in line with general betting duty, but considerably higher than the 2% for which the industry had lobbied (*see Budget 2007 Press Notices,*

www.hmrc.gov.uk/budget2007/pn-complete.pdf).

"Tax rates are especially significant for online games such as slot machines because they operate on very tight margins," says Carl Rohsler, a partner at Hammonds. "Operators can pay out up to about a 97% return to customers, and tax rates will cut into both the operators' profits and their customers' returns."

Hagan agrees: "Offshore jurisdictions like Gibraltar, Malta, Isle of Man and Alderney offer very favourable tax regimes - from 0% to about 3%. If you have a profitable operation offshore and your licensees can legally advertise in the UK, why would you relocate to the UK and pay a 15% duty? It makes no commercial sense,"

At the time the rate for remote-gaming duty was set, a Treasury spokesman said: "The UK cannot and should not try to compete with tax havens on the rate," However, with an uncompetitive tax rate, it is questionable whether the UK can compete with tax havens at all.

While playing on a website regulated in the UK might arguably attract customers who perceive UK regulation as being more reliable than regulation in other jurisdictions, the returns-driven nature of the online-gambling customer means that such considerations are unlikely to be a strong enough draw. The loosening of the restrictions on gambling advertising to permit licensees in important offshore-gambling jurisdictions to advertise in the UK alongside their UK-registered competitors has also lessened the UK's draw power (*see below, Advertising regime disappointing and uncertain*).

"If online gaming operators cannot offer competitive returns and winnings, customers will go elsewhere," says Rohsler. "Unlike a bricks-and-mortar casino, in an online environment, factors such as location, opening hours and entertainment have no relevance for the customer. Once the customer has ascertained that the website is reliable in pay-

ing out wins, he isn't particularly concerned about which jurisdiction the operator is licensed in. Similarly, remote gambling operators don't feel they need to be licensed in the UK to be reputable."

This means that, in practice, few remote-gaming operators are now expected to make use of the 2005 Act to move to the UK or set up new operations here. By contrast, there is already a reasonable presence of remote-betting operators in the UK, despite the 15% general betting duty. "Online bookmakers have different reasons for being here, as most of them emerged from companies' land-based operations and are still closely tied to them," explains Julian Harris, a partner at Harris Hagan. "But many online bookmakers are now thinking of moving offshore as well."

Licensing burdensome and costly

Part of the reason for this development is that the licensing regime introduced by the 2005 Act has not lived up to industry expectations, and several smaller jurisdictions have been quick to respond by establishing lighter and more operator-friendly regimes. "Even before the tax rate was announced there was considerable disquiet in the industry about the onerous nature of the conditions," says Harris.

Remote-gambling operators will require separate operating licences for each class of regulated activity (such as bingo, betting or casino gaming) (*section 65, 2005 Act*). Issue of operating licences is subject to compliance with the Gambling Commission's Licence Conditions and Codes of Practice (*section 24, 2005 Act*) (the conditions).

The conditions set out the rules that operators must observe to meet the Gambling Commission's three-licensing objectives of keeping gambling crime-free, ensuring that gambling is fair and open, and protecting children and other vulnerable people from being harmed or exploited by gambling (*see Legal update, Gambling Act 2005: new licence conditions and codes of practice, www.practicallaw.com/7-374-0992*).

Advertising

The advertising of gambling is currently regulated by the relevant provisions of the Betting, Gaming and Lotteries Act 1963, the Gaming Act 1968 and the Lotteries and Amusements Act 1976. All existing gambling legislation will be repealed by the Gambling Act 2005 (the 2005 Act).

Part 16 of the 2005 Act covers advertising and the promotion of gambling. It introduces a new, wider definition of advertising, which includes anything that encourages the use of gambling facilities, including entering into arrangements such as sponsorship or brand-sharing agreements (*section 327, 2005 Act*).

Ofcom has responsibility for the rules on broadcast advertising of gambling (*section 329, 2005 Act*). However, the Broadcast Committee of Advertising Practice (BCAP) will fulfil this role under its contracting-out arrangements with Ofcom.

The Gambling Commission has the power to issue codes of practice on non-broadcast advertising in consultation with, among others, the Committee of Advertising Practice (CAP). However, it has asked CAP to perform this function.

Following a period of consultation, CAP and BCAP amended their codes of practice and published new gambling advertising rules, which will come into effect on 1 September 2007 when the remaining provisions of the Gambling Act 2005 come into force.

These rules are designed to ensure that all gambling advertisements are socially responsible, with particular regard for the need to protect children and vulnerable members of society (*see Legal update, CAP and BCAP issue new codes of practice for gambling advertisements (www.practicallaw.com/3-238-1015) and Legal update, Gambling Commission recommends social-responsibility messages in gambling advertising (www.practicallaw.com/0-371-2092)*).

"There is a feeling that the conditions are too heavily weighted towards protecting children and other vulnerable people. Of course this is important, but many feel that the conditions do not strike the right balance," says Harris. However, according to Rohsler, this is not necessarily surprising: "The UK government was always going to be prudent about protecting the punter because no government wants to be seen as promoting gambling in an irresponsible way. The new licensing requirements are not unreasonable in themselves, but they are not the easy ride the industry had hoped for."

In addition to operating licences for regulated activities, individuals occupying operating or management positions at a gambling operator will require personal licences (*section 80, 2005 Act*). For non-remote gambling, a premises licence is also required (*section 150, 2005 Act*).

Aside from the specific-licensing conditions, the time and cost of obtaining a licence and maintaining it are perceived as further disincentives for offshore companies to relocate.

For example, a mid-range remote-gambling operator (which is one with an annual gross gambling yield of between £5 million and £100 million) applying for a new remote casino-operating licence in the UK is required to pay an initial application fee of £34,423 and an annual fee of £34,176.

Compare that with Malta, currently one of the most popular jurisdictions for remote gambling operations. An online-gaming licence from Malta's Lotteries and Gaming Authority is subject to a license fee of MTL3000 (about £4,720) (for a five-year licence) and an initial application fee of MTL1,000

(about £1,570). There is a renewal fee of MTL500 (about £790) a year. This, combined with considerably lower tax rates and the fact that Malta is a member of the European Economic Area (EEA), makes it a very attractive environment to set up remote-gambling operations.

Advertising regime disappointing and uncertain

The 2005 Act will introduce a new legislative framework for gambling advertising, under which certain gambling sectors, including remote gambling, will have greater scope to advertise (*see box, Advertising*).

The current rules prohibit broadcast advertising for betting and gaming; however, the sponsorship code allows bookmakers and gaming companies to sponsor programming in certain circumstances. Under the 2005 Act, gambling companies will be able to advertise in more mainstream ways, such as by television "spot" advertising, subject to compliance with the Committee of Advertising Practice (CAP) and Broadcast Committee of Advertising Practice (BCAP) Gambling Advertising Rules and BCAP Spread Betting Rules.

The government initially planned to restrict the relaxation of the rules on gambling advertising to companies that were licensed to operate in the UK or in a jurisdiction on the "white list" (a list of jurisdictions where the regulatory standards are considered to be on a par with the UK). However, the government later loosened these restrictions to permit gambling operators located in any EEA jurisdiction, including Malta and Gibraltar, to advertise in the UK because of concerns that they might contravene Article 49 of the EC Treaty (free movement of goods and services).

In a more recent turn of events, Culture Secretary James Purnell said in an interview with the Sunday Times on 15 July 2007 that the Department of Culture, Media and Sport (DCMS) was reviewing all aspects of the 2005 Act, including the rules on advertising.

Purnell issued a statement on 16 July 2007: "I will ensure that our new system of regulation, as it covers every aspect of casinos and other gambling premises - from advertising to checks on entry to controls on games and machines - will place public protection first...the gambling industry is on notice that if, despite the very stringent safeguards we have introduced, the incidence of problem gambling increases, we have taken powers to introduce even tougher protections."

On 29 July 2007, the Times reported that during talks between the DCMS and representatives of the leisure industry, the possibility of a ban on any gambling-related television advertising before the 9pm watershed was suggested. On 8 August 2007, it emerged that the gambling industry had agreed on a voluntary code of conduct, under which they would adhere to the proposed pre-watershed ban; however, as an exception, gambling-related television advertising will be permitted during sporting events broadcast before the 9pm watershed (*see Gambling Industry Code for Socially Responsible Advertising, www.gamblingcommission.gov.uk*). There will be no restrictions on the number of television gambling advertisements appearing after 9pm.

On 9 August 2007, Purnell announced that, so far, the only two jurisdictions with remote-gambling regulations rigorous enough to warrant inclusion on the white list were Alderney and the Isle

of Man. Regulations were introduced into Parliament providing these two jurisdictions with an exemption from the prohibition on the advertising of foreign gambling, which is contained in section 331 of the 2005 Act. White-list applications from Alexander (Canadian Reservation), Netherlands Antilles and Tasmania were all rejected. Applications from Kahnawake and Antigua are still being considered.

Purnell said: "I make no apology for banning adverts for websites operating from places that don't meet our strict standards. Protection is my number one priority. The fact that only Alderney and the Isle of Man have been able to meet the high standards demanded by our white-listing criteria shows how tough the Gambling Act is."

To date, gambling companies have been using other channels for advertising, such as sponsorship of football clubs (for example, 888.com's sponsorship of Middlesbrough FC, Betfair's sponsorship of Fulham FC and 32red.com's sponsorship of Aston Villa FC).

"These sponsorship deals can be worth more than £10 million each," says Rohsler. "Sponsorship is a very significant financial commitment for gambling operators, and these deals are critical for the clubs they sponsor. It's likely that gambling operators will take full advantage of the more mainstream and lower-cost advertising options that will

become available to them under the 2005 Act, and reallocate their marketing resources accordingly."

Sponsorship deals are further affected by the gambling industry's new voluntary code of conduct, which contains a commitment not to include gambling company logos on children's-replica football shirts.

The relaxation of the constraints on gambling advertising was cited as the principal reason behind the July 2007 announcement by Tote (the state-owned horse racing bookmaker) that it would withdraw its sponsorship of Channel 4 Racing at the end of the year, a deal which had been worth £2.5 million over three years. Tote intends to advertise during commercial breaks instead. However, the DCMS's advertising review cast serious doubt on advertising arrangements, making it difficult for gambling operators to plan and allocate their advertising and marketing resources.

"The Blair government came under a lot of criticism for its progressive approach to regulation of remote gambling. With the change in Prime Minister we are now seeing a more conservative attitude to the controversial issues, which is undoing a lot of the initial progress made and creating uncertainty within the industry," says Harris.

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