

---

## 2<sup>nd</sup> MOBILE GAMBLING SUMMIT EUROPE 2006

### MOBILE GAMBLING IN THE UK – PREPARING FOR THE NEW LEGISLATIVE REGIME

JOHN HAGAN, PARTNER – HARRIS HAGAN

---

#### Introduction

These are interesting times for the gambling industry generally in the UK, and the mobile gambling industry is no exception. One could be forgiven for thinking that the Gambling Act 2005 is all about super casinos. Many in the industry held their breath as the Bill progressed through Parliament in anticipation of media uproar over such issues as children gambling on their mobile telephones, armchair problem gamblers losing fortunes on interactive television and money laundering on gambling websites. Instead, it was the potential proliferation of casinos which attracted all the headlines. Remote gambling remained undetected beneath the radar, notwithstanding the impending legalisation, for the first time, of remote gaming in the UK and the introduction of a new legislative and regulatory structure for remote gambling.

This was a mixed blessing. On the one hand, we did not witness the kind of knee jerk policy making which was evident in other sectors of the industry. On the other hand, some key clauses in the Bill, with important implications for the remote gambling industry, did not get the proper debate and consideration which they deserved, for fear of drawing some of the press fire from the casino issue. The priority was to get the legislation on the statute books as the existing laws were hopelessly out of date.

In this presentation, I will summarise the key clauses of the Gambling Act 2005 and their impact on the mobile gambling industry — for example the clauses relating to the licensing process, advertising, tax, testing of equipment and social responsibility — consider the pivotal issue of whether gambling operators should be licensed and regulated in the UK or in an offshore jurisdiction and, where possible, offer some practical guidance, not least on timing.

In the next presentation, Thibault Verbiest will attempt the impossible and summarise the legal position in the rest of Europe and the panel at 4.50 p.m. will consider the impact of developments in the UK on the rest of Europe.

## Existing Legislation

- Mobile Betting is permitted under the Betting, Gaming and Lotteries Act 1963.
- Mobile fixed odds games are permitted under the Betting, Gaming and Lotteries Act 1963.
- The Gaming Act 1968 prohibits the establishment of a mobile gaming operation in the UK.
- It is lawful for UK residents to use their mobiles for the purposes of offshore gambling.
- Limited advertising of offshore gaming, but not betting, is permitted.

I do not propose to address the existing law in any detail because I am assuming that you are all familiar with it and, in any event, it will be repealed next year and replaced by the Gambling Act 2005.

Fixed odds games, such as roulette, have of course proved to be attractive to players and may be offered pursuant to a bookmaker's permit. There is a perception, particularly amongst overseas clients, that the UK betting industry is highly regulated. This is not the case. It is either self-regulating or wholly unregulated — it depends who you ask. What I can tell you is that a bookmaker's permit will be granted by many authorities in the post for a fee of £160 and that is the last you hear from any authority for 3 years.

The legality of fixed odds games has not been tested in the courts and it is unlikely to be before the new regime is implemented. Is it betting or is it gaming? Unfortunately, from a lawyer's perspective, the test case between the bookmakers and the Gaming Board was settled.

The UK mobile gambling environment may not be highly regulated now but it certainly will be when the new Gambling Act is implemented. So what are you letting yourself in for if you decide to remain licensed and regulated in the UK or move your business here from an offshore jurisdiction?

## What is “remote gambling”?

Remote gambling means gambling in which persons participate by the use of remote communication — section 4(1) GA 2005.

Remote communication means communication using:

- (a) The internet;
- (b) Telephone;
- (c) Television;
- (d) Radio; or
- (e) Any other kind of electronic or other technology for facilitating communication.

Section 4(2) GA 2005

If you do not like the term, you should speak to Clive Hawkswood who came up with the definition whilst at DCMS and is now known as the father of remote gambling . Essentially, it means that the player is not at the same place as the person offering the facilities.

Mobile gambling therefore falls squarely within the definition of remote gambling and, for the avoidance of any doubt, the technology which enables you to use your mobile telephone to gamble on interactive television also falls within the definition.

Section 4(2)(e) GA 2005 will ensure that the definition keeps pace with future developments in this field, one of the perceived failings of the existing legislation. Technology is continually evolving and it may be that someone in the audience is already developing a new method of gambling remotely, but the new legislation is flexible enough to catch it.

## “Provision of facilities for gambling”

A person provides facilities for gambling if he:

- (a) Invites others to gamble in accordance with arrangements made by him;

- (b) Provides, operates or administers arrangements for gambling by others; or
- (c) Participates in the operation or administration of gambling by others.

Section 5(1) GA 2005

A person does not provide facilities for gambling by virtue only of making facilities for remote communication available for use by persons carrying on any of those activities or persons gambling in response to or in accordance with any of those activities.

Section 5(2)(c) GA 2005.

The provision of facilities for gambling is a key concept of the Act, not least because if you are providing facilities for gambling you will need an operating licence.

Section 5(1)(a) is aimed at people and companies who are in the business of providing gambling. Any person who offers the opportunity for people to gamble over the mobile telephone will fall within this paragraph. I imagine that the overwhelming majority of you in the audience are already providing facilities for gambling or have every intention of doing so or are investing in or advising someone in that category. I do not therefore propose to go in to the niceties of this definition save to look at it from the perspective of the mobile telephone operator.

Will the mobile telephone operator, for example Vodaphone, need an operating licence? On the face of it, they fall within this wide definition of providing facilities for gambling as, at the very least, they are participating in the operation or administration of gambling by others. Fortunately, however, they are saved by Section 5(2)(c) which essentially provides that where you are doing nothing more than acting as a carrier of information for people providing facilities for gambling or consumers partaking in gambling you will not need a licence.

If, however, the mobile telephone operator or an interactive television platform operator is doing more than acting as a carrier of information and sharing in the gambling profits or marketing the gambling a licence may be required.

Brand owners should also be aware that they may require an operating licence if they enter into white label agreements. We await the Commission Guidance on this and many other important issues.

## **Territorial Application – Does the Gambling Act 2005 apply to mobile gambling operated from offshore?**

Section 33 of the Gambling Act 2005 establishes the general principle that the provision of facilities for gambling is unlawful unless it is either authorised by an operating licence or covered by a specific exception.

Section 33 applies to the provision of facilities for remote gambling only if **at least one piece of remote gambling equipment** used in the provision of the facilities is situated in Great Britain. — Section 36(3) of the GA 2005.

Remote gambling equipment means electronic or other equipment used:

- (a) To store information relating to a persons participation in gambling;
- (b) To present, to persons who are participating or may participate in the gambling, a virtual game, virtual race or other virtual event or process by reference to which the gambling is conducted;
- (c) To determine all or part of a result or of the effect of a result; or
- (d) To store information relating to a result.

Section 36(4) GA 2005

Section 33(3) — in other words an offshore mobile gambling operator will not be guilty of the offence of providing facilities for gambling without an operating licence if he does not have the relevant equipment within Great Britain. So the UK will not be like the US; just because British residents will be able to gamble with an offshore operator, that will not in itself put the operator at risk of imprisonment if he wants to come here on his holidays. On the other hand, if at least one piece of remote gambling equipment is in Great Britain, the operator will come within the scope of the offence and will have to be licensed and regulated here or risk punishment.

Interestingly, it will not matter whether the gambling is made available to UK residents or not. So, for example, if remote gambling equipment were to be operated in Great Britain and targeting, exclusively, the French market, the operator would still need a licence.

Section 36(4) — what is remote gambling equipment ?

- 36(4)(a) This will include a computer database or server storing a player s game history, his identity and records of wins and losses — the operators customer database.  
Will you be able to operate your customer services department from the UK without locating equipment storing information relating to a persons participation in the gambling in the UK as well? I don t see how, but we await guidance from the Gambling Commission on this issue.  
You will, however, be able to locate equipment used for storage of information for general promotional purposes in the UK.
- 36(4)(b) This is fairly straightforward and covers equipment used for generating and presenting virtual gambling.
- 36(4)(c) This covers, most obviously, random number generators used in virtual gaming.
- 36(4)(d) Again, this is fairly straightforward.

If you locate any of this equipment in the UK and you do not have an operating licence, you will be committing an offence.

What is not on the list? Crucially, the definition does not include equipment for accepting payment. So mobile gambling operators will continue to be able to conduct their business through UK banks. This is particularly important for certain offshore online jurisdictions which do not have sufficient banking capabilities to support substantial gambling operations.

Does remote gambling equipment include software? We await guidance from the Gambling Commission but I do not believe it can have been intended to catch software. If it were to fall within the definition, then the download of software by mobile players would result in the operator having to be licensed and regulated in the UK.

In summary, the advice to mobile gambling operators licensed offshore is, if you want to stay

offshore and do not want to be licensed and regulated in the UK and do not want to commit any offences in the UK, make sure you do not have any remote gambling equipment in the UK.

If you are happy to be licensed and regulated in the UK, there is a further implications of which you should be aware. Pursuant to section 89(2) of the Gambling Act 2005, a remote operating licence will be subject to the condition that remote gambling equipment used by the licensee in connection with the licensed activities must be situated in Great Britain. This has come to be known as the all-in-all-out clause. In truth, it should be known as the almost-all-in-almost-all-out clause but that does not trip off the tongue quite as easily.

Pretty late in the day, the Government realised that this requirement would cause enormous problems for those who wish to, for example, offer mobile or internet poker with players from other websites to ensure the necessary liquidity at all times. A new clause was therefore added which allows the Gambling Commission to exclude this condition if it is satisfied that the exclusion is reasonably consistent with the pursuit of the licensing objectives (section 89(3)). In other words, if the Commission is satisfied that by allowing an operator to have certain remote gambling equipment offshore, it would not have a negative impact on problem gambling, underage gambling, keeping crime out of gambling or fairness of the gambling, it will not be a problem.

Of course, Poker is not the only player to player game which can involve individuals in different jurisdictions being pooled by operators, and this last minute amendment to the Act is a valuable one.

## **Advertising**

Advertising is, of course, a critical issue for the mobile gambling industry and the Gambling Act 2005 will have a significant impact.

I am sure that you are all complying with the existing law and are not in any danger of being at the receiving end of the Government s crackdown on unlawful advertising. In summary:-

1. Advertising mobile gambling on television or radio is prohibited, although programme sponsorship is allowed.
2. Advertising offshore mobile betting/fixed odds games is unlawful.
3. Advertising offshore mobile gaming is lawful, but incentives, inducements or encouragements to game are prohibited e.g. sign up bonuses or free money.

Pursuant to the Gambling Act 2005, the advertising of mobile gambling products will be permitted on television and radio. The underlying philosophy is that mobile gambling is a legitimate leisure activity for adults and, where that activity is licensed and regulated, there is no reason in principle why it should not be advertised.

This will enable mobile gambling operators to reach out to a wider audience to enhance awareness of their products, to explain how they work, to explain age verification systems, reassure players that they can feel safe inputting their credit card details and, where appropriate, advertise the fact that the product is licensed and regulated in Great Britain. The consensus within the industry is that it doesn't matter to players where an operator is licensed — will this change when the UK starts issuing licences and operators begin to promote the advantages to the player of regulation in the leading jurisdiction?

### **Advertising – the new regime**

- Secretary of State to pass regulations governing the advertising of gambling — section 328 GA 2005.
- OFCOM to set standards in relation to broadcast advertising — section 329 GA 2005.
- Advertising of unlawful gambling prohibited — section 330 GA 2005.
- Advertising of foreign gambling prohibited — section 331 GA 2005.
- Socially responsible advertising only.

Section 328 of the Gambling Act gives the Secretary of State the power to make regulations governing the advertising of gambling. This will regulate the form, content, timing and location of advertisements, including details of any health warning — instead of your doctor or your pharmacist can help you stop smoking, how about your bank manager or your wife can help

you stop gambling ? It will not surprise you to know that these regulations have not yet been drafted, but the emphasis will be on the protection of children and other vulnerable persons from being harmed or exploited by gambling.

In relation to broadcasting, it will be the Office of Communications ( OFCOM ) which will set the standards, but it must consult with the Gambling Commission and ensure that its standards reflect the Secretary of States regulations. I understand that the consultation is well under way and we await the results of that consultation.

What **do** we know about advertising under the new regime?

- It will be an offence to advertise unlawful gambling — section 330 of the Gambling Act 2005.
- It will be an offence to advertise foreign gambling — section 331 of the Gambling Act 2005.

What is foreign gambling? It is remote gambling which is not regulated by the gambling law of any European Economic Area State ( EEA ) or by Gibraltar. It will not therefore be an offence to advertise gambling which is regulated by the gambling laws of, for example, Malta, France, Ireland, Latvia or Gibraltar.

Further, the Secretary of State may by regulations provide for a specified country or place to be treated as if it were an EEA State. This is the famous white list and the first two names which are likely to appear on it are Alderney and the Isle of Man. Licensees in the likes of Antigua or Kahnawake should not hold their breath.

In practical terms, if the ability to advertise in Great Britain is important to your business, and you do not wish to be licensed and regulated in the UK, you should be making plans to be licensed in an EEA State, Gibraltar or a white listed country by September 2007.

In the case of remote advertising, the offence of advertising foreign gambling will only apply where the advertising is targeted at people in Great Britain, although this includes making data available in circumstances such as it is likely to be accessed by one or more persons in Great

Britain. It is one thing to prohibit the advertising of foreign gambling on the internet, it is quite another to enforce the prohibition.

## **Taxation**

What will be the rate of tax in the UK — that is the \$64,000 question. The industry remains in the dark. DCMS can do no more than state that this is a matter for HM Treasury and HM Treasury agree with DCMS. However, we can now see the light at the end of the tunnel and the Government announced in its Pre-Budget Report on 5 December 2005 that the rate of taxation for remote gambling will be set in the Budget 2006. One would have thought that the Government has invested too much time and effort in remote gambling only to make the legislation and regulation of academic interest only by introducing too high a rate. I have no doubt that the rate will be higher than that in existing remote gambling jurisdictions but, if it is pitched at the right level, there will be operators who believe that it is a price worth paying.

Some encouragement may be taken from the Government's expressed desire to host an international online summit. It would be embarrassing for the UK to host such a summit if none of the industry were to be based in the UK.

## **Applying for a Remote Operating Licence**

Assuming that the rate of taxation is not unduly onerous — a big assumption — and that there are sound business reasons for being licensed and regulated in the UK, for example the ability to advertise in the UK market is important to you, or you want to locate your customer service department in the UK, or you have significant land based gambling operations in the UK and feel that it would make sense to locate your entire operation here. What licences will you need and how and when should you go about getting them?

To operate mobile gambling, the operator will, unsurprisingly, require a remote operating licence. Two important points. First, a remote operating licence does not automatically confer an entitlement to use all forms of remote communication. The remote licence must specify the mobile telephone. Secondly, the remote operating licence must specify the particular type of gambling activities which the operator wishes to provide, the most obvious example being casino

gaming and betting.

- Timing.
  
- Application and renewal fees.
- General principles
  1. The prevention of gambling from being a source of crime.
  2. Ensuring that gambling is conducted in a fair and open way.
  3. Protection of children and the vulnerable from being harmed or exploited by gambling.
  4. The suitability of the applicant to carry on the licensed activities:
    - Financial circumstances
    - Integrity
    - Competency

Application must be made to the Gambling Commission, and the present timetable is that the Commission will begin to consider these applications in January 2007 with a view to new licences starting to take effect in the autumn of 2007.

The application fee and an annual renewal fee will be payable. We do not yet know the amount of these fees, although you can rest assured that it will be more than the £160 payable for a bookmaker's permit and I would expect it to be significantly lower than the application fees payable in some existing online gambling jurisdictions. In Alderney, for example, the annual licence fee is £70,000, so tax is not the only financial consideration.

We do know already that the fees are designed to reflect the Commission's costs of regulating the mobile gambling industry, so at least the industry will not be subsidizing casinos.

The detail of how the Gambling Commission will consider applications will be set out in their Statement of Licensing Policy and a first draft of that Statement is presently available for consultation.

In the meantime, we do know the general principles which the Gambling Commission will apply.

I will outline these general principles; and attempt to put some meat on the bones to help you determine whether you want to be licensed and regulated in the UK, and if so to identify some of the issues to be addressed within your own business sooner rather than later.

Crime — money laundering is an obvious example and as part of the application procedure, operators will have to demonstrate that they have appropriate procedures in place to prevent and detect money laundering. Details of any relevant offences must be listed on the application form and the Commission will undertake criminal records checks in any event. The Commission will have extensive powers in this area and take a serious view of any crimes involving dishonesty. I do not imagine that these matters will be an issue for anyone here today — do criminals go to business conferences?!

Fair and open — it is likely to be a requirement of the application process that the equipment used for the generation of results in virtual events has been tested and satisfactory evidence of the results submitted to the Commission (section 89(5)(e) of the Gaming Act 2005). Clients tell me that testing of systems is even more expensive than lawyers and almost as time consuming!

Operators will have to ensure that their rules are fair and that easily understandable information is made available to players about the rules of the game, the probability of losing or winning and the terms and conditions. For logistical and technological reasons, I am struggling to see how this can be done over the mobile telephone and the most likely solution may be that players are going to have to register online, rather than on the telephone itself. I do not believe that the Commission is going to compromise on important principles, just because of the technological difficulties of applying those principles to mobile telephones.

Protection of children and the vulnerable — the protection of children and the vulnerable is one of the licensing objectives, pervades every aspect of the Gambling Act and was at the forefront of the Government's thinking as the Gambling Bill progressed through Parliament. It would be difficult to underestimate its importance. How will this impact the mobile gambling specifically?

Age verification — how will you ensure that children do not take part in mobile gambling? The Commission is presently consulting on the practical measures which can be implemented. For the time being, we know that the technology is developing all the time and the Commission will

expect operators to make best use of the systems that are available to meet their obligations. The challenge for the Commission will be to strike a balance between rigorous verification procedures and the risk of driving players to unregulated sites which may not undertake any checks.

### **Social Responsibilities**

Problem gamblers — again we do not have the detail of the measures which will be implemented, but the Commission is considering the following:-

- Training of staff and guidance on how far staff will be expected to intervene if it is to be believed that a customer may have a gambling problem.
- Arrangements for self exclusion.
- Reality checks (such as clocks and breaks in play).
- Speed of play restrictions.
- Display of information about problem gambling and where help may be obtained.

Operators will be required to demonstrate how they propose to meet the requirement to be socially responsible in the manner in which they are for gambling.

Financial circumstances — is the applicant sufficiently well funded to ensure that the operator will not be tempted to cut corners when it comes to meeting its social responsibility obligations and to ensure that its gambling debts will be met. Applicants will have to supply statements of their assets and liabilities and may be required to establish reserves to cover potential liability.

Demand will not be an issue in relation to determining applicants for operating licences. There is no limit on the number of remote operating licences which may be granted for mobile gambling.

### **Software Licences**

What about the software manufacturers and suppliers? A gambling software operating licence is required to manufacture, supply, install or adapt gambling software for use in mobile gambling.

## **Personal Licences**

A remote operating licence is not the only licence you will require. The Gambling Commission will also identify individuals within your organisation who will require personal licences. The types of functions for which personal licences may be required will fall into the categories of management and operational. At the risk of repetition, proposals for personal licensing in the mobile gambling sector will be issued for consultation in due course.

## **Is the UK the place for your business?**

I have endeavored to give you a flavour of the new legislative and regulatory regime in the UK and its impact on the mobile gambling industry. There are still significant unknowns but hopefully the position will become clearer as we continue the long countdown to implementation. The target date for publication of licence conditions and codes of practice is June 2006. I cannot advise you generally that you should be in the UK or another EEA State or Malta or Alderney or Gibraltar. The decision will depend upon the requirements of your particular business, but I have drawn up a list of the most important considerations, which are as follows:-

1. Tax.
2. Ability to advertise in the UK.
3. Reputation.
4. Flexibility.
5. Convenience.
6. Future business plans.
7. Regulatory costs.
8. Employee considerations.

## **Conclusions**

In conclusion, there is absolutely no doubt in my mind that the UK mobile gambling industry has enormous growth potential. The synergy between mobile telephones and gambling is obvious and the challenge for the industry is to continue to strive to meet customers expectations in

terms of entertaining products, technical reliability, ease and speed of play. By the autumn of 2007, the UK will have a modern legislative and regulatory regime. This will bring opportunities, but also significant challenges. I have no doubt that the UK Government has the best intentions for the industry, but that is not to say that the regime will be attractive to operators. There remain significant unknowns, but this is not surprising as the implementation of the legislation is still 20 months away. Social responsibility issues will be to the fore and as long as they are addressed to the satisfaction of the Gambling Commission, it will be on the industry's side. Operators will have to weight up a multitude of issues and assess whether they wish to be licensed and regulated in the UK. As Big Brother would say, a world leading mobile gambling jurisdiction — you decide.

**John Hagan**  
**Harris Hagan**  
**26 January 2006**