

The New UK Licence Requirements

By Marcos Charif

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The Business Secretary, Vince Cable, has recently warned that Britain could face a double-dip recession as the Bank of England prepares to slash growth forecasts. The dreaded downgrade threatens to derail the Chancellor's deficit reduction plan, with the Government expected to receive less tax revenue in the future. In times like these, governments tend to become tax-inventive and it is therefore no surprise that the UK is the latest domino to fall in Europe by adopting a national licensing regime regulating online gambling on a "point of consumption" basis – all for the protection of consumers, of course.

In a way, the UK has nothing to lose and the UK Gambling Commission has only few licencees to upset, as most large UK online gambling operators have already sought refuge in tax friendly offshore locations. A lot has been said about tax and a lot more will be said about tax, and the time is now ripe for even more tax (and Horse Race Betting Levies of course...) so let's leave the tax restructuring to accountants and let's leave the horses to battle the levies out with EU Competition Lawyers instead. Even so, with all the tax mania going on, the UK Government, including its horses and tax advisors, will still have to wait and see whether the new licence requirements will bring the "old boys" back home.

What is clear, however, is that the new licence requirements are in fact nothing else than a national licensing regime, similar to the French and Italian licensing models: If it looks like a duck, swims like a duck and quacks like a duck, then it probably is a national licensing regime! In a way, the introduction of a UK national licensing regime is only a natural consequence of market dynamics, with the UK the latest duck in the pond.

The White List

However, what did previously set the UK apart from other European states were its grand gestures towards "white listed jurisdictions", which allowed non-EEA mini state-lets where wild animals reside and ancient tongues are spoken, to target the UK market for free. The UK's open door policy, coupled with the tax friendly environment of white listed jurisdictions, is seen by many as the UK's main Achilles heel. Regardless what online gambling operators may argue, the UK's tax regime is still highly competitive when compared with its European counterparts and the UK could truly have become the leading gambling jurisdiction and European gambling centre. However, with the gates wide open to tax friendly White Listed jurisdictions, the UK has, in effect, sealed its own gambling destiny. There is no way HM Treasury can compete with a 0% corporation tax or scrap VAT altogether and it is therefore no surprise that the White List will be phased out.

Although the current White List will be a thing of the past, the UK Gambling Commission will be permitted to recognise regulatory good practice; consequently businesses in "trusted" White Listed jurisdictions will have a much lighter touch approach and will not have to duplicate regulatory work. In addition, White Listed Operators and EEA licensed operators will be given a grace period and a transitional UK licence to allow them uninterrupted

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trading before the UK Gambling Commission takes over. This seems to be a fair peace offering to operators in White Listed jurisdictions, however, it is yet unknown whether the friendly “transition” will already incur tax and other disclosure liabilities vis a vis the UK Gambling Commission. In a way, it could be argued that the White List, with all its tax competitiveness, and ability freely to access the profitable UK gambling market, has cut off the hand that feeds it. The UK Gambling Commission, if it wants to be taken seriously and grow some teeth, must have a degree of control over online gambling services offered to UK residents. Unfortunately, as the laws of the land go, this can only be done with a national licence. It is still arguable whether the UK would have ever followed the European trend, were it not for the White List tax-leak, but things in the online gambling world move so quickly that it is pointless to dwell on the past because the next levy is already around the corner.

Europe

With national licensing regimes being the flavour of the day, European Law for online gambling has become as relevant as sun cream for English summer days. Memoranda of Understanding between EEA member states only highlight the ongoing European fragmentation. With all these exciting developments in mind, it is no surprise that the UK, similar to Denmark, may look beyond European borders altogether and offer its online gambling licences to *“anybody based anywhere in the world who wants to sell gambling services to any consumer based in the UK”*... That would, indeed, be an interesting prospect! And if it applied, what would then be the advantage of being or remaining in the EEA? The only visible advantage so far appears to be a smoother transition period before the UK national licence is introduced, other than that it is difficult to fathom what else should keep operators in Europe if the White List advantage is passé?

It is worth noting that the rates of tax in Italy and France are considerably higher than the current tax rates in the UK; however once the UK adopts the national licensing approach, then remote gaming and betting duties would no longer be the decisive factor, because online operators would be required to pay these in different jurisdictions, depending on where the players are located. What will be a decisive factor however, is which country offers the most cost effective base for online operators and where labour costs and tax rates are most favourable. Most other industries in the EU have witnessed similar migrations in similar scenarios: witness the German car industry, which now produces most of its components in Eastern Europe, Spain and further afield. The new licensing regime may therefore see a further migration of UK based operators – the question is: where to?

White listed jurisdictions, regardless of the proposed new licensing regime, nevertheless remain highly attractive. Until now, the advantages for online gambling operators to be licensed in white listed jurisdictions (and not in the UK) are mostly attributable to their right to access the UK gambling market without being liable to pay UK tax, as well as their own favourable taxation regimes. With national licensing regimes popping up left right and centre,

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gambling operators are forced to respond by diversifying their businesses and indeed clearly separating between B2C operations (which will require national licences) and B2B operations (which are subject to far less restrictions on national levels). With the UK stepping on to the national licensing carousel, White Listed jurisdictions are indeed well placed to cater for their B2B requirements. Data centres, broadband connections and servers - all are already prepared for the next phase.

However, with the UK now opening the gates to the rest of the world, some may argue that the White List is now competing for the best B2B location with international contenders, some of which may indeed be highly competitive.

Instead of the UK Gambling Commission and the British industry in general competing (and mostly likely winning) on a European level, which may indeed have some attraction to bring the “old boys” back home and attract some new ones as well, the UK Government is now prepared to compete against the rest of the world – and the White List will have to go along with it. The likely outcome is not a “welcome home” song, but may trigger operators to leave Europe altogether. With Asian markets on the rise, it is difficult to see the UK Gambling Commission turning down applications from industrial Asian nations and those in the making; and it is even more difficult for White Listed jurisdictions to lower their tax rates below zero to compete with these new B2B contenders.

One would have thought that the UK Government’s experience with the White List should have been lesson enough. In other words: with the markets of the world wide open, the UK, once again, will not be able to compete for gambling operators to relocate to British shores and will have to settle to regulate gambling services within its borders instead.

There is no doubt that the UK national licensing regime will be a welcome money maker, but whether this would also mean that employment would be created is debatable without expatriate gambling operators also returning home to UK shores!

The integrity of tax or taxing integrity of player data?

Regardless where B2B will migrate to, the UK national licence should enable the UK Gambling Commission to exercise a degree of control over its licensees. The UK Gambling Commission’s Licence Conditions and Codes of Practice (LCCP) require UK licensed betting operators to share information on suspicious transactions with the Gambling Commission and sports governing bodies. In 2010, the Sports Betting Intelligence Unit (SBIU) was created to collect information and develop intelligence about potentially corrupt betting activity involving sport.

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It is therefore no surprise that the SBIU has been contacting UK licensed operators, reminding them of their disclosure obligations and requesting the disclosure of players' personal data under the UK Data Protection Act 1998. Unfortunately for the SBIU and the UK Gambling Commission, it can only ask UK licensees "nicely", but has no powers over overseas licensed operators. This is about to change with the UK national licencing regime, which will now empower the UK Gambling Commission to seek data disclosures from faraway places.

There have been several reported cases where gambling operators have been sued by data subjects for disclosure of their personal data to sports bodies. One such case was reported in 2009, in which Italian tennis players initiated legal proceedings against gambling operator Interwetten, which had disclosed their personal data (under a memorandum of understanding) to the Association of Tennis Professionals, which in turn suspended the tennis players. Interwetten, as data controller, remained ultimately responsible for breach of data protection and all five tennis players therefore sued Interwetten and not the ATP. If that were to be repeated, then it would be Good News for the UK Gambling Commission and the SBIU, but Bad News for the rest of us.

Only recently, John Penrose (the Minister responsible for gambling) announced the start of a consultation which would formally allow the UK Gambling Commission to share information with the International Olympic Committee (IOC) before, during and after the 2012 Olympic Games. It is planned to add the IOC to the list of bodies under section 350 of the UK Gambling Act 2005 (the Act) to allow a fluid share of information between the organisations. However, this close cooperation requires changing the Act, as does the new UK national licence.

No reputable gambling operator will dispute the importance of sports integrity, or indeed the importance of sharing information to combat crime and prevent match fixing. In fact the main players across Europe are keen to cooperate. However, the issues are not as straightforward once sports bodies are involved. For the past eight years, sports bodies have been searching for legal justifications to insist on bookmakers paying a "fair return" for the use of their events. With the rapid growth in online betting across Europe and the significant profits made by the online betting industry, the pressure on bookmakers has been rising, with increasing calls from the sports industry to protect its "sports rights" and "betting rights". Currently, neither of these rights has a foundation in intellectual property rights. As a result, a long and onerous odyssey through various national courts and the European Court of Justice has been undertaken by both sides, which has exposed the limited use of intellectual property rights in obtaining a slice of betting profits.

The issue of trademark infringement by bookmakers has been tried and tested in the French courts, which have decided that, although sports bodies clearly have a right to take legal action to stop bookmakers from infringing their trademarks, they cannot prevent bookmakers from using trademarks to identify sports bodies and events.

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Attempting to establish database rights in fixture lists and racing details resulted in a further blow to the sports industry, when the European Court of Justice (ECJ) surprised the legal world with its narrow interpretation of the Database Directive, thereby significantly reducing the scope of protection to the creator of a database. Invoking IP rights to charge bookmakers has proved to be unsatisfactory. As a result, contractual obligations assumed a more significant role in allowing sports bodies to control access to their databases – until now! With the announcement of a UK national licensing regime, sports bodies are now keen to include their “fair share” in law and statute and as part of the overall amendment to the Act.

The French have already introduced a IP sports right and it will be interesting to see what line the UK government will take. Sports bodies have often mentioned in one breath their right to a “fair return” together with preserving “integrity”, as if these two issues are closely interlinked. The only logical conclusion is that sports bodies attempt to convince the public that a “fair return” is necessary to preserve integrity; and they have done a pretty good job so far.

The new UK national gambling licence will therefore treat overseas betting operators in the same way as UK bookmakers and ask all for money. It does not, however, resolve the wider context of sports bodies’ call to receive a “fair return” from the betting industry, nor does it account for the introduction of a new sports law and, most importantly, it fails to address the underlying problem of why betting operators went offshore in the first place.

Never boring...

Introducing new licensing requirements for offshore operators not only means that sport will become even richer than it ever was before, but it also means that the offshore entity has to comply with UK Data Protection laws and reconsider data protection strategies. In a way, the introduction of a UK national licence was inevitable. However, instead of shutting the market to the rest of the world like decent Europeans would do ... the UK decided to increase the pressure on itself and on the White List by inviting the rest of the world in.

The outcome is predicable: B2B operators in tax friendly environments will profit, while the number of B2C operators will be reduced to few big players who will comply with the requirements of 27 EU member states, and who are obliged to disclose their player data to 27 regulators and beyond, while bearing the risk of unjust disclosures and reduced profit margins. It could end being a mad, mad, mad gambling world.

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