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New licence requirements for overseas gambling operators

The UK's 2007 liberalisation movement seems to have been unsuccessful in creating satisfying operating conditions for foreign gambling providers. The UK Government is in the process of looking for new ways to attract new operators - 'ways' which are being heavily criticised by many in the sports and betting industries. Marcos Charif, an Associate at Harris Hagan, examines the UK Government's plans to create a better future for the national online gambling market.

The Gambling Act 2005 (the Act) came into force in 2007 and was hailed as a model for the rest of the world, in terms of liberalising the UK gambling market in a socially responsible manner and in accordance with EU law. The UK Gambling Commission, created at the same time, is responsible for all commercial gambling in the UK and has three statutory objectives:

- to keep gambling free of crime;
- to ensure that gambling is conducted in a fair and open way; and
- to protect children and other vulnerable people.

However, nearly three years after coming into force, the Act has failed to attract online operators to apply for a UK gambling licence. Moreover, the UK's ambitious plans - to be spearheaded by the UK Gambling Commission - to lead and be an example for the liberalisation of the European online gambling market have not been realised. Instead, the UK is witnessing an exodus of online gambling operators.

It comes as no surprise that the UK Government decided, in April 2009, to review the UK's position so as 'to create a level playing field' for UK gambling operators. On 7

January 2010, Sports Minister Gerry Sutcliffe announced the outcome of this review and revealed proposals for new licence requirements for overseas online gambling operators. The details of the consultation exercise are not yet known, but the new licensing regime is expected to oblige all operators who are active in the UK market:

- to share information on suspicious betting patterns with UK sports governing bodies;
- to comply with UK licence requirements, including the protection of children and vulnerable people; and
- to contribute to the cost of research, education and treatment of problem gambling.

The UK Government is also investigating ways of securing fair contributions from overseas operators to the horserace betting levy and expresses its intention to keep the White List 'in some way'. Significantly, however, nothing is being said about the most important aspect: taxation.

In other words, there seems to be no real intention to make the current UK market more attractive - instead, additional restrictions on overseas operators are proposed. The effect may be to create a level playing field on which nobody wants to play. Is this the beginning of the end of the liberal UK approach? More importantly, is this the right way forward? These questions can be answered only by understanding what went wrong in the first place, and by looking at the wider context.

Much has been said about the reasons for the UK's failure to attract more online gambling operators. Some still long for the days of the Gaming Board for Great Britain, which enjoyed an international reputation for effective and tough, but fair, gambling regulations - at a third of

the budget and staff of the UK Gambling Commission. It is understandable that those people are disappointed that the UK Gambling Commission has not proved to be three times as successful as its predecessor.

Others have wondered how gambling activities can properly be placed under the auspices of the Department for Culture, Media and Sport (DCMS) - a department which, by its name alone, infers a predisposition in favour of the gambling industry's constant critic - the sports sector - and a department whose website contains no clues about the gambling industry and which an outsider (and many insiders) would not even suspect of being connected to the world of gambling. This poses the question of what (if any) expertise exists within the DCMS, not only in gambling in general, but in the special nature of online gambling. Although no one wants to see the return of the gambling sector to the Home Office, having gambling under the governance of a 'charitable' sports oriented department has proven unsatisfactory. Many are asking for the upcoming consultation to consider a transfer of the responsibilities for gambling to a more suitable, commercially aware and less biased governmental department, such as the Department for Business Innovation and Skills, or the Department of Trade and Industry.

Perhaps the substantive mistake of the authors of the Act and of the current proposals is a failure to have recognised, from the outset, that money matters. How can the Government have decided to open the UK online gambling market to White List and European Economic Area (EEA)-based operators 'for free', while expecting its licensed operators to stay in the

UK and pay high levels of tax in addition to other (ostensibly) never-ending financial contributions, such as the horserace betting levy? Solving this question is at the core of the success or failure of any new UK licence requirements for overseas gambling operators. In fact, the answer has become even more complicated with the opening up of various European gambling markets and the introduction of new licensing regimes in France and Italy. Any UK solution must, therefore, take into account developments in EEA states and in white-listed jurisdictions if it is to be effective in improving the UK's position.

The 'controlled opening' of the French and Italian online gambling markets will definitely have an impact on the future of UK online gambling. France and Italy intend to issue national gambling licences to EEA-based online gambling operators, who will then be liable to pay local taxes. However, these national licences will allow online gambling operators to offer their services only to local players. This raises the question of UK taxation, which until now has been operator driven (i.e. taxation on origin) and not player driven (i.e. taxation on destination). It is still unclear how the issue of taxation will be addressed when introducing new UK licences, but if overseas operators are now to be liable to pay UK tax, then UK-based operators should not be liable to the Treasury for overall profit, but should be judged on player location and destination, like their European counterparts.

It is also worth noting that tax rates in Italy and France will be considerably higher than the current tax rates in the UK. However, if the UK were to adopt the French/Italian approach, remote gaming and betting duties

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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 to other EEA Member States.

White-listed jurisdictions, regardless of the proposed new licensing regime, 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, coupled with unrivalled expertise and sophisticated technology. Understandably, recent EU developments have not gone unnoticed in these jurisdictions, which have reacted by adjusting their current regulations to meet these new challenges. Alderney, for example - which is known for its high standards on gambling regulations, while, at the same time, remaining responsive and understanding of the commercial realities and dynamics - has announced a new licensing regime with separate licences for B2C and B2B operators. B2C licences will be available for organisations that contract with players directly (and which can therefore apply for national licences in France, Italy

and possibly in the UK), while B2B licences are aimed at gambling platform operators who do not have direct interaction with players and who, therefore, do not have to be 'controlled' by the national jurisdictions.

This quick reaction will ensure that some white-listed jurisdictions will remain the country of destination for online operators. Online gambling operators will be required to apply for licences in Italy and France, but could theoretically, at the same time, channel players to a gaming platform in, for example, Alderney (B2B). This division makes sense, because an operator - who is required to be licensed in multiple jurisdictions - need only use the one platform for all its businesses. This would not only save costs, but would also facilitate multi-player games where players are located in separate jurisdictions and, most importantly, white-listed jurisdictions continue to have favourable tax conditions that the UK cannot compete with.

If the UK attempts to link the new licences to UK taxation, only few operators will relocate to the UK. Even this, however, would neither create new jobs for the industry, as the operators will remain offshore, nor would it encourage operators to apply for a licence in the first place, as the costs associated with doing business will be a deterrent to any online operator from entering the UK market.

If, on the other hand, the new UK licence for overseas operators does not include the tax burden and will, as announced, focus solely on consumer protection, it will still be difficult to see how this taxless tiger can create a level playing field for UK-based operators. The reason is that, even without taxation, the horserace betting levy is still a thorny issue. Moreover, with

European state aid rules complicating the imposition of a levy on operators, it will be interesting to see what options are available to the UK Government, whose intention it is to create a level playing field for UK-based operators in the first place. Clive Hawskwood, Chief Executive of the Remote Gambling Association, has already stated that 'any attempt to apply the horserace levy, which is a hypothecated tax, offshore would trigger a legal challenge to the whole system on state aid grounds'. This risk should not be underestimated and the continuing debate on the levy may indeed generate a further headache for the UK Government.

There is an additional spectator waiting to benefit from the new licence regime: the sports industry. The Central Council of Physical Recreation, in its role as the alliance of governing bodies of sports and recreation, did not waste much time in welcoming the proposals on the ground that they would increase integrity, because offshore operators will be required to share information regarding suspicious betting patterns with UK sports governing bodies. That the new licence may also result in an enormous financial increase to sports bodies' budgets was not mentioned. Yet, even that may not keep this spoiled child quiet. Sports bodies have often mentioned their right to 'a fair return' from bookmakers' profits in the same breath as preserving 'integrity', as if the two issues are interlinked - and they will likely continue to do so until they push through new exclusive intellectual property (IP) rights, which would force bookmakers to hand over a proportion of all sports-betting turnover to them. Might that then be enough? Not necessarily. A separate consultation by the DCMS is also underway to tackle

the issue of integrity. A report was published recently containing various recommendations that include a proposal to set up a new cross-sports betting integrity panel within the UK Gambling Commission (named the Sports Betting Intelligence Unit) to investigate possible breaches that could lead to criminal prosecutions. But who will finance this new unit? Take a guess.

It could be said that the DCMS is entering unknown and complex territory by adopting the French/Italian model of introducing a national licensing regime for overseas operators. In fact, primary legislation would be needed to implement most of these changes. With an election on the horizon, nothing will change before the results are out and it is still unclear what approach the Conservative Party will take, if elected. It may be that a Conservative government would not be interested in being involved in the gambling industry, in the short term. Analysts predict that the Conservatives are likely to stay away from gambling regulation altogether and leave the DCMS and the UK Gambling Commission to make changes through delegated legislation. Time will tell however, because it is likely that no actual steps will be taken until the end of 2011. This is not good news for the UK. Neither is the playing field levelled, nor does anyone want to play on it. A fair return is far from being fair if integrity continues to be questioned and sold to the highest bidder.

The best New Year resolutions are those that are thought through and are clear and achievable quickly and in a wider context, otherwise they fail. Perhaps some more thought needs to go into these new proposals if they are to achieve their stated aim and perhaps, this

time, all factors will be considered, including tax, the horserace betting levy, the sports bodies' continuous demands, IP rights, European developments, white-listed jurisdictions, appropriate governmental departments and, of course, commercial realities. And hopefully, this time, the DCMS will consider seeking advice from legal and commercial experts from the gambling industry as well to provide assistance throughout the consultation process.

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