

NEW BRITISH LICENCE REQUIREMENTS FOR OFFSHORE ONLINE GAMBLING OPERATORS: REASONS, IMPLICATIONS AND PREDICTIONS

by John Hagan and Melanie Ellis

Article first published in *Canadian Gaming Lawyer* March 2010

The UK online gambling market is unusual, in that it allows operators based in the European Economic Area and 'white-listed' jurisdictions to advertise their services freely to UK residents without any kind of local licence. When drafting the Gambling Act 2005, the legislators took the view that these provisions were necessary to ensure compliance with European Community Treaty, which provides for freedom of movement of services between member states. However, the result has been that very few online operators have chosen to remain in the UK, primarily due to the tax rate of 15% on gambling profits. Being able to market their services to the UK without obtaining a local licence and without paying the local tax rate has meant overseas operators, particularly those based in low or zero tax jurisdictions, have been having their cake and eating it.

There is no doubt that the status quo is ideal for operators targeting the lucrative UK market. Against the background of this relatively open market, the proposals announced at the beginning of this year by the UK Minister for Sport, Gerry Sutcliffe, represent a radical reform of the system. The Government intends, subject to a consultation period, to force all remote gambling operators who wish to advertise or provide services to the UK to obtain a licence from the UK Gambling Commission.

The political reasons behind this u-turn are discussed below, but from a legal perspective it has become apparent that the UK would continue to stand alone in its, with hindsight unimaginative, interpretation of EU law. The position of other member states has ranged from an outright ban on online gambling (which can be compatible with EU law, but only if justified for reasons such as protecting the public) to a movement towards allowing operators from other member states to target the local market, but only if they obtain a local licence. Although the EU Commission has objected to the details of France's draft legislation, for example, it does not appear that the Commission believes that the local licence requirement is illegal in principle. One question raised in response to the French law, which the UK Government must also now address, is the extent to which it will be taken into account that an operator is already licensed in another EU jurisdiction. There are early indications that the new UK law may include a fast track licensing procedure for those already holding a licence in a European or white-listed country.

The Government emphasises that the purpose of these proposed reforms is to ensure that UK players are protected, whether they are gambling on websites based in the UK or overseas, by making all operators targeting the UK subject to the same standards of regulation. At present, in the absence of any European code of conduct for online gambling operators, there are no uniform requirements and no guarantees as to the integrity and standards of those currently able to offer their services in the UK.

The Government has also reasoned that the proposed reforms will 'level the playing field', protecting the interests of online gambling businesses based in the UK. Under the present system, operators based overseas often have a competitive advantage over those in the UK.

NEW BRITISH LICENCE REQUIREMENTS FOR OFFSHORE ONLINE GAMBLING OPERATORS: REASONS, IMPLICATIONS AND PREDICTIONS

by John Hagan and Melanie Ellis

Article first published in *Canadian Gaming Lawyer* March 2010

The current laws require only that an operator is subject to the laws of an EEA or white-listed state to advertise in the UK; it does not necessarily even need to be regulated or licensed in that state. Although white-listed states, at least, have been approved by the UK Government by reference to the standards of regulation in place, questions have been raised, not least in the UK Parliament, about the latest inclusion in the list of Antigua & Barbuda. Being subject to lesser (or even non-existent) standards of regulation means lower overheads, enabling operators to offer greater incentives to UK players compared to those subject to UK standards. Lower or non-existent taxation in some overseas jurisdictions is obviously another critical factor which gives non-UK operators a competitive advantage in the UK market.

So, the Government's proposals to apply the same standards of regulation to all operators targeting the UK market are intended to protect UK players and help UK-based businesses. However, there are also clear financial incentives for the UK Government to reform the law as well. Firstly, if a level playing field is not achieved, UK operators may abandon the UK and move their businesses offshore, reducing tax revenue for the Government. Indeed, some high profile remote betting operators, such as Ladbrokes and William Hill, have already made this move. This is less of a consideration in respect of online casino operators, as less than 20 such operators hold a UK licence in any event.

As well as persuading existing UK business to remain in the jurisdiction, the UK Government, notwithstanding protestations to the contrary, must have one eye on the huge potential tax revenues to be gained from forcing all operators targeting the UK to pay UK taxes. Since commencing offering licences to those wishing to target its residents, the Italian Government has enjoyed substantial tax revenues (a large part of which has gone towards rebuilding the historic town of L'Aquila following the 2009 earthquake). In the UK, a tax rate of 15% on gambling profits currently applies to online operators, and if this rate is applied to all UK licensees under the new system, Government coffers will enjoy substantial benefits. It is for HM Treasury to set tax rates while the Department for Culture, Media and Sport is responsible for drafting the new legislation, but DCMS has indicated that it will liaise with HM Treasury in relation to the tax implications of the new system. It is conceivable, but we think unlikely, that a lower rate will be introduced.

The high cost of becoming licensed in the UK and paying the associated taxes may, of course, result in some less reputable operators choosing to disregard the law and continue their activities in the UK regardless. The UK will face the same technological and legal jurisdictional challenges in enforcing the new requirements as are faced by other countries implementing a similar system, notably Italy, France and Denmark. At the very least, such operators would be severely restricted in their ability to advertise in the UK, particularly on television, radio and in newspapers, due to the requirements of the various advertising codes.

NEW BRITISH LICENCE REQUIREMENTS FOR OFFSHORE ONLINE GAMBLING OPERATORS: REASONS, IMPLICATIONS AND PREDICTIONS

by John Hagan and Melanie Ellis

Article first published in Canadian Gaming Lawyer March 2010

The key question for operators currently enjoying the status quo is when these changes are likely to come into effect. After the announcement of the proposals in early January, it was expected that the consultation period would commence shortly. However we are still awaiting the release of the consultation document, which will set out the Government's proposals in more detail and contain further information regarding how it is proposed that the system will operate. It may be that an early announcement regarding the proposed changes was forced by a leak of the proposals, but with a general election on the horizon, it may also be that this issue is not at the top of the Government's list of priorities. In any event, we think it unlikely that any changes, which will involve reform of primary legislation, will come into effect before 2011 at the earliest.

The Gambling Act 2005 reflected the view of the UK Government that European laws required that operators in other EEA countries be allowed to offer their services freely in the UK. However, developments in Europe, criticism from UK operators and controversy arising out of the white-listing of Antigua & Barbuda have pressurised the UK Government into considering a new system, with the double benefits of ensuring the protections enshrined in the 2005 Act are applied to all UK consumers and of increasing the revenue from this growing industry. The cost of obtaining a UK licence and paying UK gambling duty will be a significant burden on the industry. However, the UK is such an important market that there is no doubt that UK facing gambling operators currently licensed and regulated offshore will obtain a licence in the UK if that is made a requirement.

John Hagan
Melanie Ellis
HARRIS HAGAN