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B2B & B2C licences: impact for operators and regulators

The Alderney Gambling Control Commission recently unveiled its new licensing framework that will split the current online gambling licence into two areas - business-to-business and business-to-consumer. Marcos El Charif and Melanie Ellis, Solicitors at Harris Hagan, examine the implications the framework will have on online gambling operators and regulators.

Since the Alderney Gambling Control Commission ('the AGCC') unveiled its new licensing framework at the Gaming Executive Summit in Madrid earlier in 2009, online gambling operators and regulators alike are assessing the possible implications. There is no doubt that the proposed changes are not only significant, but are a direct and flexible response by Alderney to recent developments in the online gambling industry.

The new licensing framework
Regulations setting out details of the new framework are expected to be issued in early November, to come into effect at the beginning of 2010. One of the most significant changes is the 'splitting' of the current full eGambling Licence and the separation of operations into two distinct areas: business-to-customer ('B2C') and business-to-business ('B2B'). Each of these operations will require a separate licence: Category 1 (B2C) or Category 2 (B2B). Applicants for both licence categories will be required, as are eGambling licence holders under the current regime, to establish a legal presence in Alderney.

Both licences could be held by the same entity, if it contracts with players directly and operates its own gambling platform. Both

types of operators will need approval of their Internal Control Systems ('ICS') and gambling equipment ('EGE') but the requirements will be tailored to the business of each type of licensee.

A B2C business will also have to meet obligations aimed at the protection of the player/customer, including data protection policies, unfair contract terms, online terms and conditions, advertising, e-commerce regulations and codes of practice.

Associate Certificate

A new variant is the new category of Associate Certificate for non-resident B2B operators. Under the AGCC's original plans, a non-resident Category 2 licence is proposed, but it was recognised that only Alderney-based entities should be licensed.

This new non-resident B2B Certificate is important, because it allows B2C players to be transferred seamlessly and without warning to a foreign B2B operator. The player does not need to be notified of the transfer.

B2C licence holders are also at liberty to contract with non-certified foreign gambling platform providers, but players will have to be notified. This can encourage players to end their game instead of being transferred offshore.

Existing categories of Associate Certificates for software, banking and management providers will continue to exist alongside the new Certificate.

Hosting Certificate

To ensure that gambling equipment operated by Foreign Platform Providers can be located in approved premises, the AGCC has decided to extend applications for Hosting Certificates to those located outside of Alderney and Guernsey. Obviously, a foreign B2B operator who wishes to obtain an

Associate Certificate will not be able to do so until a conveniently located hosting premises has applied for and obtained a Hosting Certificate.

Practical implications

Separating the framework into B2C and B2B licences and the Associate Certificate means operators will only pay for the functions that relate to them. It will also divide the compliance burden between B2C and B2B operations.

Competitively priced

The structure and level of the licence fees is designed to compare favourably with other jurisdictions when combined with Alderney's benign tax regime. The current flat rate annual fee of £70,000 for the full eGambling licence has effectively been split equally between two categories (B2C and B2B), requiring each of the applicants to pay an initial licence fee of only £35,000.

The B2C licence fee will be based on the amount of net gaming revenues ('NGR'). To soften the blow, the fee has been split into four categories based on NGR, with a maximum cap of £140,000 per annum for B2C companies generating more than £7.5 million in NGR. Regardless of actual NGR, it is proposed that the annual fee will only rise by one fee band per year, so the maximum fee of £140,000 would not be reached by any new licensee until the fourth year of operation. It is worth noting that the AGCC will be on the lookout for any off-market arrangements between B2B and B2C licensees designed to reduce the fee level payable by the B2C operator.

The annual fee for the new Foreign B2B Certificate is the same as that for a B2B licensee at £35,000 per annum. However, the AGCC will not carry out the same

level of investigation into ICS and EGE as it would for a licence applicant, recognising the reality that the same standard of regulation cannot be applied to those based outside the jurisdiction.

Some platform providers currently operating under an Associate Certificate will qualify for (and have to transfer to) the new B2B licence. This will require them to meet the relevant standards associated with this licence, including approval of ICS and EGE, as well as reporting requirements and key individual certification. Grandfathering will therefore be offered to these operators to facilitate the transition with a six month grace period to ensure all the new requirements are addressed.

Although the new licensing framework will encompass a range of technical and financial considerations, it nevertheless encourages start up companies and smaller online gaming operators to be licensed by Alderney and allows them to manage their costs as they grow.

European developments

Most national legislation purports to impose restrictions to protect the players/consumers, while effectively protecting their gambling monopolies.

The EU remains split on how to legislate the online gambling industry. Although Articles 43 and 49 of the EC Treaty provide for the fundamental freedom of establishment and the freedom to provide cross-border services, only 13 of the EU's 27 Member States approve of online gambling. Seven states restrict gambling to state owned monopolies and another seven follow the US model of a total ban.

It is therefore no surprise that more gambling-related national

The new licensing system will mean better conditions for start ups and higher licence fees for some existing Alderney licensees

court cases are being referred to the European Court of Justice (ECJ) for preliminary ruling. On 8 September 2009, the ECJ published a further judgment on this issue¹ that goes against its previous rulings. The judgment strikes a blow to the gambling industry, concluding that restrictions on the provision of services may be justified by overriding reasons relating to public interest, if the intention is to prevent criminal offences. Prohibiting private online gaming providers from offering games of chance is therefore compatible with Community law.

Meanwhile, a growing number of infringement procedures have been launched by the EU Commission against Member States' national gambling laws, triggering some to open their markets and start regulating and taxing online gambling. Rather than following the UK approach, most Member States are keen to retain a degree of control by issuing their own licences.

The AGCC's unique B2C and B2B licences should be seen in this context. Alderney has recognised the growth in national licensing in the EU, most of which resembles its B2C licence. This is unsurprising, bearing in mind the Member States' rationale of wanting to protect residents. Online gambling operators will therefore still require various national licences, but may, at the same time, be able to channel players to a gaming platform covered by an Alderney B2B licence. This division makes perfect sense, because an operator who is licensed in various jurisdictions need only use the one B2B platform for all its businesses. This would not only save costs, but would also allow for greater flexibility.

In order to ensure that B2B licensees only contract with

properly licensed B2C operators, approval from the AGCC will be required of any such relationships.

Changing dynamics

Another key development that has been addressed is the increasing entry of media companies, specialised service providers and a continuous growth in network gaming. A full eGambling Licence may not be suitable for these newcomers, whose business does not involve direct interaction with players. Offering a separate B2B licence is therefore a logical and competitive conclusion, which enables relevant technical and financial standards to be set for these operators.

The B2B market in general is growing rapidly, making it more difficult for regulators to distinguish between core services (that ought to be regulated) and associated services (that require less regulation). The continued diversification of businesses in the online gambling sector can only be met by an equally diversified regulatory framework that takes into account the changing nature of business realities. The introduction of a B2B licence is therefore a welcome development for gambling platform providers, as it will relieve them from complying with B2C standards relating to player interaction while giving them the option to be licensed in Alderney.

Private equity and joint ventures

Some may argue that the new licensing framework also encourages private equity investors, who have so far shied away from online gambling, mostly due to negative headlines surrounding the regulatory position of the industry. So where might private equity invest? B2B suppliers may be interested in the context of a technology

investment, especially in light of non-gaming investors' desire to enter the market. B2C companies offer options to grow a brand and own and monetise a customer demographic. In return, private equity provides potential liquidity and/or management expertise to capitalise on attractive growth opportunities.

The nature of the business of a B2B licensee makes this category particularly interesting to private equity houses. There will be less (if any) involvement with various national regulatory requirements that online gambling operators have to meet when applying for national licences across the EU to allow registration of local players. With attractive growth potential for consolidation and the new possibilities that the AGCC licensing framework has to offer, private equity investors may shortly be eyeing up the B2B gambling market.

The two licence categories also allow for an increase in joint venture activities. The obvious synergy would be between (offshore/Alderney) B2B gambling platform providers and (onshore) national brand owners (i.e. established gambling operators in developing markets - sometimes even former monopolies) that have built up their brand and reputation. The B2B operator can offer high quality regulated transactions, a respected licence status from a strong compliance jurisdiction, as well as the marketing expertise to create profit. The national brand owner would apply for the required national licence and also bring with it local political and economic know-how of the gambling market and player following. This joint venture scenario is already being contemplated and the cooperation between an Alderney B2B licence holder and a national respected

gambling company will be a force to reckon with. It will definitely make it more difficult for unknown foreign operators to penetrate the market.

Competition law

The EC Treaty prohibits agreements that prevent, restrict or distort competition. UK law has similar prohibition on agreements affecting trade. The EU also requires mandatory notification of certain joint ventures. Whilst this is not a reflection of the licensing framework, it is nevertheless a reminder to gambling operators and investors to avoid the pitfalls of competition law when dealing in B2B.

A B2B licence holder will sometimes have more than one contracting B2C party and could also enter into agreements with B2C rivals. If information on strategic planning of a rival is exchanged through B2B, the gambling market may be affected - in that case, competition law will be hovering in the background with a sledge hammer. The relationship between information sharing parties and the kind of data exchanged will be a decisive factor. Considering that B2B platforms are often owned by gambling operators themselves, such owner-participants may well obtain access to sensitive information about their rivals. This falls within competition law.

Competition issues also arise where B2B platform providers exclude certain gambling operators. As B2Bs are often operated by major players in the gambling industry, there may be the tendency to deny access to rivals, or to allow access only on disadvantageous terms.

Conclusion

The attraction of Alderney to gambling operators has always

been twofold: the high standards of regulation and resulting cachet that it gives operators and the lack of any taxes in the jurisdiction. The licensing fees are higher than some other jurisdictions, but when taxation is taken into account, Alderney remains attractive from a financial as well as regulatory perspective. The new licensing system will mean better conditions for start ups and higher licence fees for some existing Alderney licensees, particularly those with higher revenues, but in our view the jurisdiction remains commercially attractive and is one we would continue to recommend to operators.

It is difficult to deny that the AGCC has set some hares running as a result of its proposed new regime. It is equally difficult to deny that the changes are nothing if not the result of a clever commercial analysis of the current market and future trends that are likely to keep Alderney as a 'destination station' in the itinerary of gaming operators. But the changes also present considerable commercial opportunities for gaming operators to specialise, grow and become more profitable, as well as affording ongoing and increased protection to consumers. Perhaps inevitably, all good ideas have their downsides (hence the shadow of competition law and what some may regard as the premature rise of private equity) and boundaries will inevitably be pushed. That said, the future continues to appear robust.

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1. Bwin and Liga Portuguesa de Futebol Profissional v Portuguese monopoly Santa Casa da Misericórdia de Lisboa



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