UK GC releases long awaited software guidance note

The UK Gambling Commission published in June its long awaited guidance note on gambling software, entitled 'What is gambling software,' which seeks to offer clarification on the type of software requiring a licence, amongst other things. Tom Grant of Harris Hagan analyses the guidance in detail.

As the window for applications for continuation rights has now opened in the UK, some of the focus has shifted to gambling software and, in particular, who in the supply chain will require a licence. In June, the Gambling Commission (the 'GC') published its guidance setting out what constitutes gambling software and offering clarification on a number of points that the industry has been grappling with.

The starting point is to consider the two relevant instruments that delineate the boundaries of gambling software: the Gambling Act 2005 (the '2005 Act') and the new Licence Conditions and Codes of Practice ('LCCP'):

1. Legislation - section 41 of the 2005 Act provides that a person commits an offence if 'in the course of a business he manufactures, supplies, installs or adapts gambling software unless he acts in accordance with an operating licence.' This offence applies to any gambling software developer located in Great Britain (regardless of where its customers are located) and the GC has previously stated that it also applies to any gambling software supplier that supplies an operator licensed in Great Britain. Section 41(2) of the 2005 Act broadly defines gambling software as 'computer software for use in connection with remote gambling.' A literal interpretation of this would effectively capture any software used by an operator offering remote gambling. The GC's approach since the enactment of the 2005 Act, in September 2007, clearly indicates that this was not the intention. The key to understanding the true intention can be found in the explanatory notes to the 2005 Act, which state that 'the purpose of this offence is to ensure that people responsible for generating gambling software do so in a regulated environment to ensure, in particular, fairness for players.' This reference to 'fairness' is crucial and goes some way to suggesting that the role of a developer in manufacturing, supplying, installing or adapting software will be defined by whether the relevant software affects the outcome of the game.

2. LCCP - licence condition 2.1.1, which will take effect from 30 January 2015, states that 'all gambling software used by the Licensee must have been manufactured by the holder of a gambling software operating licence. All such gambling software must also be supplied to the Licensee by a holder of a gambling software operating licence. Such software must only be installed or adapted by the holder of such a licence.' Whilst this was the GC's general policy for reasons of suitability, it will now become a formal licence condition of every remote operating licence. This condition establishes the principle that the GC's new roster of licensees, as well as existing licensees, must source their gambling software from licensed gambling software developers. This, in itself, does not clarify which entities in the supply chain will require a remote gambling software operating licence but the GC's guidance note elaborates by offering some direction on the questions that operators and developers will need to consider.

The GC has confirmed that it is not concerned with software which is 'used by non-gambling businesses as well as gambling businesses.' In other words, general infrastructure software or business applications will not be considered to be gambling software, where it is merely used to support an operator's primary function of providing facilities for gambling. This exclusion does not, however, extend to products that are 'produced' using such non-gambling applications. If, for example, a generic piece of business software is used to create a piece of gambling software, then the resultant software will be considered to be gambling software if it satisfies the definition under the 2005 Act. In these circumstances, the chain will extend to the newly developed software but the licensing requirements will not be incumbent on the manufacturer of the generic design software.

By way of clarification, the GC has provided examples of the type of software that would require a gambling software licence and these include bet capturing and software responsible for elements of the customer journey such as settlement and in-game bonuses. Interestingly, this non-exhaustive list is postfaced by the underlying principle of ensuring that software manufacturers who can impact on the fairness of remote gambling should do so in a regulated environment. It is clear from this that the concept of something that can affect 'fairness' remains at the heart of what might constitute gambling software. Further, the GC plans to publish, in its next FAQs, a series of examples to provide further clarification where a software supplier is also providing facilities for gambling under section 5 of the 2005 Act.

The GC has examined the four key activities of 'supplying, installing, manufacturing and adapting' separately. Their guidance on each can be summarised as follows:

(a) 'supplying' - there is no expectation that resellers in the supply chain who have no involvement in the software's manufacture, adaptation or installation would require a licence. This exception does not apply where an entity is the final link in the supply chain, even if they do not undertake any of the technical activities;

(b) 'installing' - if a supplier reaches under the bonnet of a GC licensee, then they will require a software licence. It follows from this that software that is installed onto key equipment (which is defined at section 36(4) of the 2005 Act) is likely to be classed as remote gambling software. This 'hands on' criteria extends also to gambling operator licence holders who may wish, for example, to install software updates; and

(c) 'manufacturing and adapting' - these two activities are grouped together and focus on the activity of software development. Evidentially, this might be the most straight-forward test, but the GC acknowledges that it becomes more complicated where multiple parties are involved in the development process. In such cases, the GC will consider each case on its own merits and its conclusions will depend largely on the precise arrangements, but it has confirmed that it will primarily focus on the entity that has ultimate control of the development of a product. The key word in the note here is 'control.' In order to assess what is required here, the GC has set out some useful questions that developers should consider when analysing which entities within the supply chain will require a gambling software licence, as follows:

The GC has provided examples of the type of software that would require a gambling software licence and these include bet capturing and software responsible for elements of the customer journey such as settlement and in-game bonuses

- Which company is responsible for the design and functionality of the software?
- Which company is responsible for approving design changes?
- Which company is responsible for the functionality and acceptance testing?
- Which company is responsible for the quality assurance/regulatory compliance testing of the product?
- Which company retains the IP for the relevant product?
- What does the contract say in terms of responsibilities and liability?

The final question is an interesting one and, whilst it is unlikely that the GC will want to examine each and every supply contract, operators and developers will need to consider this issue as part of their contractual negotiations as it may be of relevance if the GC were to scrutinise a particular relationship. Ultimately the GC is likely to be looking to determine whether the contract between the parties in essence involves purchase of a product or merely payment for time and expertise.

In reality, it may well be that any company that engages in one of the stages of manufacturing and adapting gambling software might be minded to obtain a gambling software licence (even if the company's involvement may not always be considered a licensable activity by the GC) as it may give it a competitive advantage over other software developers during any tender process.

The guidance note also clarifies that a gambling software licence does not entitle a licence holder to carry out any activity that would be deemed to be providing facilities for gambling. In these circumstances, it will also require a remote operating licence. The examples provided here are the hosting of a poker network or the provision of a games platform and, again, a direct reference is made to parties who are 'responsible for the fairness of gambling.'

Summary

The guidance note offers an extremely useful insight into the GC's thinking and the key considerations that operators and suppliers will need to contemplate when deciphering what role each party involved in the supply chain is performing and who might step over the threshold of licensable activities and at what stage. The foremost challenge for the industry arising from this latest note, therefore, will be how to classify the various relationships that may exist along the chain. As we have seen, it appears that 'control' and 'fairness' should be at the core of any self-assessment process.

Some operators and developers may have been hoping for more detail than is currently available but the GC has sought to strike a balance as to how prescriptive it can be. There are two reasons why this measured approach is important: firstly, it is not the GC's role to provide legal advice and it is important in any regulated market that those who are regulated play their part in scrutinising their own activities and ensuring that the entire supply chain meets the regulatory requirements; secondly, software development is so complex that it is simply not possible to adopt a 'one size fits all' approach by providing a prescriptive list. The pace at which this industry is innovating and expanding requires constant re-examination of multifaceted development chains.

Tom Grant Partner
Harris Hagan, London
Grant@harrishagan.com