

**Text of address by Julian Harris to
Kalf Katz & Franssen's Annual Gaming Industry Event**

Amsterdam - 30 January 2015

Introduction

1. I am flattered to have been invited by Justin and Alan to speak at such a renowned event. Those of you who have attended before know that Justin and his colleagues are great hosts and put on a great reception with excellent food and drink, good company and interesting high level presentations: I hope that I am not about to provide an exception to that last rule.
2. Generally speakers are drawn from the Government and Regulatory Authorities, and I know that Justin had hoped that you would be hearing this evening from Jenny Williams, the CEO of the UK Gambling Commission. Jenny, not surprisingly, is rather busy at present, and, for some reason, I was thought to be a suitable alternative. As many of you know, I am not a regulator, but an independent gaming lawyer like Justin and my firm has represented a substantial number of those seeking licences under the new British licensing regime.

What change?

3. I have been asked to comment on the new online licensing regime in Britain introduced this year. In the same way as country names offer a dilemma for foreigners in this country, as to whether they should refer to it as Holland or the Netherlands, people usually refer to my country as the United Kingdom, or UK for short, but in this case the regime applies not to the whole of the United Kingdom, which includes Northern Ireland, but only to Great Britain, all of which may make you think that Shakespeare's reference to "*perfidious Albion*" is perhaps justified. Now I am sure that nobody here wants to be taken through the new legislation, the Gambling (Licensing and Advertising) Act 2014, and - have no fear - I wouldn't dream of subjecting you to that. What I propose to do is to outline what it is all about, the effect it is having on both operators and the regulatory authority, the UK Gambling Commission, and to highlight some key areas of interest.
4. In the UK, we have since 2007 had an open market, in which any operator licensed either in an EU Member State, or in one of the so called white listed jurisdictions (Alderney, Antigua and Barbuda, Gibraltar, Isle of Man and Tasmania), could offer online gambling products to people in the UK, and advertise their products there without obtaining a UK licence, unless they had gambling equipment located in the UK: only in that case did they require a UK licence. The new Act requires all gambling operators that provide facilities for remote gambling or advertise to consumers in Britain to obtain a licence. I should mention here that the reference to consumers in Britain is not simply to British residents, but to anyone located in Britain. In other words, anyone physically located in Britain when gambling facilities are used, whether resident there or not.

When?

5. The legislation came into force on 1 November and anyone able to apply for a continuation licence, which in short meant anyone operating under the previous provisions under a non UK licence, had to make application by 23 October. There is little point now in me going through the transitional provisions because obviously the time for those applications has past. What I will just say is that anyone operating in the UK or advertising there since 1 November commits a criminal offence by providing facilities for gambling in Great Britain without a licence, and I hope that realisation doesn't cause anyone in this room an unpleasant shock. Most if not all continuation licence applications were granted, which enabled operators to continue supplying products to the UK under the transitional provisions, until such time as their licence application was determined in full. Those licences could be used to enter into new contracts with customers or other licensees, but they could not be varied until the Commission had come to a favourable final determination of the application. Although for a relatively short period, this did cause some surprising difficulties for a number of operators.
6. There is a contrast with what is happening in this country. As I understand it, the proposed legislation here will open up a hitherto closed market, and operators will, for the first time, be able to obtain licenses to offer online gambling in the Netherlands. So the contrast with the Netherlands is that Britain has not opened the market, but rather made it more restrictive, and that was one of the grounds for a legal challenge made by a group of operators licensed in Gibraltar, some of whom were also major UK operators. That challenge did not succeed, and I won't go into the detail of the case but it does provoke the question why did the UK change.

Why?

7. The challenge was partly as to whether the reasons for the new regime were consistent with European Law. Until November, the Gambling Commission only regulated approximately 15% of the UK online market. Its estimate is that the proportion that is unregulated in the UK will now itself be approximately 15%, making the UK regulator responsible for some 85% of the market. One of the Gibraltar operators arguments was that most of that 85% of the UK market was being provided by respected operators, some of whom were head quartered in the UK, operating under licences in extremely well regulated jurisdictions, including some of the ones I have mentioned.
8. Until November, the Gambling Commission only regulated less than 15% of the UK online market with the illegal market very small, well under 5% it was generally thought. The Commission estimate is that the illegal or black market proportion will only have gone up marginally, making the UK regulator now responsible for some 95% of the market. One of the Gibraltar operators' arguments was that most of that 85% of the UK market not regulated by the UK Gambling Commission was being provided by respected operators, some of whom were head quartered in the UK, operating under licences in extremely well regulated jurisdictions, including some of the ones I have mentioned. As we all know obtaining licences and maintaining licences is not a cheap process, in addition to which there are tax consequences now of having to be licensed in the UK. Nevertheless, I suspect that most jurisdictions, including this one, would find it anathema that much of their market is not controlled

and monitored by their own regulators, where much of the industry therefore makes no contribution to problem gambling and where 85% of the market is in effect exempt from the regulators social responsibility policies and other measures. To illustrate this, of 176 operators who applied under transitional arrangements, 166 were new to the Commission and 10 adding new activities to their existing licences.

9. For the Commission, as Jenny Williams said recently, the rationale behind these changes was clear. To use the Commission's strapline, their role is to keep gambling fair and safe for all and to advise Government on the impact of gambling and its regulation. Plainly, where the Commission regulates less than 15% of that market, it lacks the experience required to tackle current and emerging risks to the licensing objectives for the majority of operators. This new legislation ensures that these operators, once licensed by the Commission, must provide the Commission with timely information on suspicious betting transactions, or on individuals who might be of interest to them because of, for example, their gambling activity. And with remote gambling growing, and as more jurisdictions offer remote licences, the Commission were unable to apply the latest best practice regulation to the benefit of British consumers, without persuading a growing number of other regulators to do the same, some of whom were under pressure to attract licensees to their jurisdictions. It also enables the Commission to deter black market competitors more effectively, as licensees are required to obtain gambling software only from Commission licensees, thus deterring any illegal suppliers trying to compete in the British market.
10. This area – software licensing - has caused considerable difficulty. Anyone who manufactures, supplies, installs or adapts gambling software used in connection with remote gaming requires a licence. Some clients have expressed surprise at this, where, for example, they are using a software supplier from a jurisdiction on the other side of the world who has no experience of Britain. When one drills down to the detail of what manufacture and adaption of software entails, the requirement is a broad one.

What do the changes mean?

11. So what do these changes mean in practice for operators. Although the extension of the regime is new, the Commission already had a regulatory framework for remote gambling operators with an established fee structure and licence conditions and codes of practice. A principal change brought about by the Act is the application of that framework to those with key equipment outside Britain who want to market to those in Britain. The Commission do not require operators to move key equipment, or to have staff employed in Britain, provided that operators can produce the address of an official representative in Britain, who may be an accountant or solicitor, and provide an assurance that the Commission will have full access to their staff and to gambling related records.
12. So what was Jenny referring to when she spoke about the framework contained in the existing structure? Well that includes some important requirements:
 - Technical standards: fortunately during the transitional period games already tested lawfully could be made available in the British market. No further testing would be required if the testing already carried out met Commission requirements.

- Personal management licences for individuals: those who have responsibility for the following areas require a personal licence:
 - Overall strategy and delivery of gambling operations;
 - Financial planning, control and budgeting;
 - Marketing and commercial development;
 - Regulatory compliance;
 - Gambling related IT provisional security.
 - The objective is to hold the personal licence holder as well as the operational licence holder (i.e. the business) accountable for the way in which the gambling is provided. The Commission try to address compliance and enforcement activity at the key functional personal licence holders (including for example marketing director) in the first instance, with the compliance PML holder being second in line and not first as in so many jurisdictions.
 - Licensees are also responsible for their subcontractors and business partners. They must therefore ensure that any regulatory or statutory obligations on the licensee are reflected in and supported by contracts with subcontractors or suppliers.
 - Social responsibility and harm minimisation measures. These include, for example, self exclusion measures, information on players, customer interaction and gambling management tools, such as timeouts and financial limits and reality checks/auto play functionality.
 - Regulatory returns. These cover, for example, volume of business and various social responsibility indicators, such as number of self exclusions or suspicious activity reports.
 - LCCP is relatively un-prescriptive compared to most other jurisdictions, to quote Jenny Williams on this, “relying instead on requiring the operator to have effective policies and procedures to achieve the licensing objectives. With greater experience we are firming up or developing conditions and codes to help those operators who wish to be socially responsible and compliance not be undercut by less responsible operators and to operators focus on priority issues.”
13. I mentioned that the requirement for licensing has certainly not been regarded by the Commission as simply a requirement instituted in order to raise tax. Tax is the responsibility of the Treasury and the Commission are not involved in tax collection. The investigative process undertaken by the Commission has been extremely thorough. All of the applications for continuation licences were granted subject to a quick review, but since then the Commission has been undertaking very thorough investigation before granting the full licence. I think it fair to say that during the process they have learned a great deal about the way in which the online industry operates, but it has been a steep learning curve. So for example, the Commission had to understand how B2B operators work, and the appropriate licensing requirements for those providing a gaming platform. In addition, they have had to wrestle with the concept of umbrella licensing, because for some operators, for example very large B2B and platform operators, some of those for whom we have

acted have on the face of it required numerous licences, in one case no less than 10. Commission fees and the amount of work involved, for clients and for us, makes that a very expensive exercise and is extremely time consuming.

14. The test for umbrella licence will look at the following indicative factors:
- Is the company doing the licence holder's work? If it does the same type of work for other entities, it may be that it is acting in the course of its own distinct business.
 - Are the accounts consolidated with the licence holder's? If not, is the principal the sole customer?
 - Is the company a wholly owned subsidiary of the principal?
 - Does responsibility for compliance rely with the principal?
 - Does responsibility for adherence to technical standards rest with the principal?
 - Do governance arrangements show that the business is controlled by the principal?
15. As in most licensed regimes, the key matter for regulators is that of establishing integrity. One of the issues in which the Commission has been interested is that of grey/black markets. The Commission has required operators to disclose as part of their application the jurisdictions in which they provide facilities or accept players from and the revenue that those markets generate as a percentage of their overall online revenue. They wanted B2C businesses to disclose any market where they obtained 3% or more of their total revenue, and whether and why they consider it not illegal to provide those facilities. Where they rely on legal advice, rather than a licence, the Commission expects businesses to disclose from whom that advice has been obtained. For B2B operators the requirement is less onerous, requiring a breakdown into three categories:
- (a) Operators with point of consumption licences in jurisdictions other than Great Britain;
 - (b) From Commission licensed operators; and
 - (c) From other operators where the B2B applicant may be uncertain about the player's locations.
16. However, B2B operators are required to disclose how they decide with whom they will contract and what contractual constraints are imposed on their clients. Onerous though this may sound, the UK licensing regime does permit operators with a UK licence to take play from any jurisdiction where it is not illegal to do so. That does not limit operators only to those jurisdictions where they can obtain a licence, but they must be satisfied that they are not acting illegally, which they certainly would be if, for example, they were to take play from a jurisdiction where a licence is available but where they do not have one.

17. A number of applicants withdrew from grey markets prior to submission of their application e.g. William Hill stopped taking on line bets from 55 countries, the majority being places where the legality of on line gambling is doubtful. Other operators have withdrawn from some markets since as the landscape changes i.e. Ladbrokes and Betclac recently withdrew from Russia. No doubt as much because of concerns about reputation in US but the Commission can take some credit. Withdrawal from Russia was probably more to do with the new law, operators facing up to four years in a Russian jail and fines of up to 1m roubles (\$15,000) for organising illegal gambling, including through the internet.
18. It is probably already clear that it is easy to trigger the requirement for a UK licence. If you take any play from the UK you need a licence; but what happens if you simply want to advertise in the UK? One of the issues that arose during the transitional period was whether overseas operators would be permitted to advertise to those in overseas markets; for example by sports sponsorship or advertisements on the perimeters of football fields, without accepting UK bets. In theory the answer is that if no UK bets are accepted, the Commission will not normally licence such operators and no offence would be committed because access from British consumers is blocked. However, it is fair to say the Commission do not like it, particularly if there is any non remote advertising such as on shirts or billboards where the Commission argue the inaccessibility to those gambling in Britain needs to be clear 'as advertised'. And it is risky, given the possibility that some players may make it onto the site. Further those accepting sponsorship also take the risk of assisting unlicensed operators to provide gambling facilities illegally in Britain.
19. So what has happened since the Act came into force and since the applications have received thorough scrutiny? Well the Commission has been doing a very thorough job indeed. Despite the very steep learning curve on the part of many of those employed at the Commission on the operation of online businesses, the Commission has demonstrated an interest in ensuring that the industry operates in accordance with Commission requirements. We have seen numerous enquiries from the Commission in relation to the detail of terms and conditions, on anti money laundering requirements, on protection of customer funds, and questions on jurisdictions from which operators are accepting play. The Commission has been testing areas of compliance and found it to be, in their words, "reasonably good." Licence holders have wisely responded quickly to address any concerns.
20. For the most part, and I think unusually, my firm undertook the work of actually uploading applications, which could only be done online in this round of licensing. We prepared questionnaires, gathered information from the clients for them in relation to any questions from the Commission. There was also a lot of work on restructuring to take advantage of umbrella licences. Most of the difficulties have been encountered by those clients who did their own applications, and in one case have now come to us, having been advised that they didn't apply for enough licences, which is plainly a serious matter.
21. In total, the Commission received 176 continuation applications and 440 PMLs/Annex As. Two applications have been withdrawn, and certainly most of our applications have now received final approval. The number of gambling software

applications is to date¹ 88, including the 46 continuation licensees who applied for software at the same time. The deadline for software licensing is 31 March and, as of last week, some 33 operators have been reminded that their applications are outstanding. The Commission expect a total of just over 100, but for those who have not yet applied, there is a danger that their application will not be determined in time, and there are no continuation rights here. Some operators using those suppliers may need to make contingency plans, because those using suppliers who do not hold a licence post 31 March will be in breach of their licence and may face regulatory action. The number of applicants new to the Commission is slightly over initial estimate of 150 applications and the Commission is confident that all those identified as targeting GB pre November applied. It had identified about 150 operators trading into GB on whitelist or EU licences; almost without exception they applied plus some they were not aware of. The limited exceptions were a handful of IOM sports book licensees who were focussed on the Far East and had few or no British customers. They preferred to withdraw completely and block British customers as opposed to building a genuine British business and continue advertising and a few small businesses from Malta who took a commercial decision to withdraw completely from the British market. E.g. Yggdrasil referred to in the JR

22. There has been little evidence to date that there are large numbers of operators targeting GB without the appropriate licence – less than 10 cases to date of apparently illegal online gambling operators. The majority quickly heeded the cease and desist letters and they are no longer targeting Great Britain. The Commission are also advising their local regulator where appropriate of the action taken. In the remaining cases, the Commission will be utilising their agreements with Visa and MasterCard to disrupt their activities. They know from earlier experience that the payments processors such as Visa, PayPal and Skrill are very responsive to evidence that they are or might be going to deal with an illegal operator and will use their T and Cs to terminate doing business with them. This improved register and licence condition makes it very easy for payment providers to check if someone has a GC licence.

Comparisons and Lessons

23. As I said at the beginning the British experience is different from that of the Dutch, and the circumstances of the new British regime are very different from those that apply here. For many years the Netherlands have had an unregulated market dominated by monopolies, giving rise to a national law that could be criticised under European law. From what I understand the legislation is at a crucial stage, but there is strong debate on a number of outstanding issues. At the risk of perhaps of instant deportation though I have planned for that by being on a 9.00pm flight anyway, I would just mention three issues:-
 - With the exception of those luckily enough to operate the current monopolies in Holland, all other operators supplying Holland since online gambling became popular are necessarily treated under Dutch law as being illegal. There is therefore a debate as to whether or not they should be considered for licences as and when licences become available. Inevitably there will be pressure from

¹ As of 30 January 2015

the monopolists to prevent those applications from being considered for reasons of understandable self interest. Aside from the European legal issues which might well be part of the reason for the opening up of this market, I would say, frankly, that one has to be pragmatic and realistic when opening a monopoly market. If all those currently operating in the Dutch market, many of whom are large well known companies who have dominated the market for years, are prevented from continuing in that market, the effect will be to create a distorted market dominated by the existing monopolies and companies who hitherto have had no presence here and therefore who are unlikely to be well regulated major operators. A much more sensible approach would be, for example, to take the Danish approach, where operators were told that they should cease their operations once the law was passed, and before licence applications could be made, which I believe was a period of about 6 months. I remember a meeting I arranged between a major B2B operator and the Danish regulator, Birgitte Sand, when my clients said they would of course cease operations and supply of their products to other companies immediately, but they asked what the consequences would be for those companies who continued supply up until the stage when applications could go in. Birgitte's rather pragmatic approach was to say well, there won't be any automatic refusal but those applications may find themselves at the bottom of my in tray for sometime.

- Taxation: in most jurisdictions there is a discussion about the apparent unfairness of having a higher rate for terrestrial gaming and another rate for online operators. Although this may appear unfair, there is in reality a good basis for it. The vast amount that needs to be spent on advertising and marketing for online products, but with often marginal profit levels, tend to mean that an online business can become very quickly non-viable if unrealistic tax rates are set. Moreover, and particularly with sports betting, odds become less attractive than for products offered by operators in other jurisdictions, which will mean that the black market becomes more attractive to consumers. If you are going to open a market, you must let it operate commercially and make a profit, or you will kill it at birth, just like the French did. As in so many areas, France is not an example to follow. Again the Danish market is another example, and it should be remembered there that the land based industry challenged the different tax rate in the European Court and lost. A tax rate at 15% is high for online, but a tax rate equivalent to the land based rate here of 29% would mean that your online industry would be stillborn or at least die in infancy.
- In order to minimise the risk of match fixing in football, it is argued that the Dutch legislation should not permit bets on events during a game whilst also proposing a licence condition, as we have in the UK, that licensees be required to record suspicious transactions. Whilst there have been examples of attempting to secure winnings by influencing games in football and cricket for example, this type of betting is becoming increasingly popular with consumers and I would ask whether their enjoyment should be prejudiced by the illegal activities of a few. In reality, certainly in the UK, operators are experienced in spotting suspicious activity and one has to ask whether again prohibition is the answer, with the consequence that such bets are likely to be placed elsewhere, on unregulated sites, or whether it is better to permit the bets and to have legal and regulatory control over them. For me, the answer is in the question.

Conclusion

24. I have spoken at some length about the UK market and now started to lecture on the Dutch market. Before I become too unpopular, I think I had better go and resume my seat and handover to someone who can talk with more authority on the Dutch proposals.

**Julian Harris
Harris Hagan
30 January 2015**