New UK licensing requirements

Data Protection and other "unimportant" things to consider…

By Marcos Charif

Article first published in iGaming Business September 2011

The Business Secretary, Vince Cable, has recently warned that Britain could face a double-dip recession as the Bank of England prepares to slash growth forecasts. The dreaded downgrade threatens to derail the Chancellor's deficit reduction plan, with the Government expected to receive less tax revenue in the future. In times like these, governments tend to become tax-inventive and it is therefore no surprise that the UK is the latest domino to fall in Europe by adopting a national licensing regime regulating online gambling on a "point of consumption" basis – all for the protection of consumers, of course.

In a way, the UK has nothing to lose and the UK Gambling Commission has no licencees to upset anymore, as most large UK online gambling operators have already sought refuge in tax friendly offshore locations. A lot has been said about tax and a lot more will be said about tax, and the time is now ripe for even more tax (and Horse Race Betting Levies of course…); so let's leave the tax restructuring to accountants and let's leave the horses to battle the levies out with EU Competition Lawyers instead. However, with all the tax mania going on, operators, including their horses and tax advisors, should not underestimate the additional "surprises" this "consumer protection licensing package" may bring with: data protection restructuring of course!

The UK Gambling Commission's Licence Conditions and Codes of Practice (LCCP) require UK licensed betting operators to share information on suspicious transactions with the Gambling Commission and sports governing bodies. In 2010, the Sports Betting Intelligence Unit (SBIU) was created to collect information and develop intelligence about potentially corrupt betting activity involving sport.

It is therefore no surprise that the SBIU has been contacting UK licensed operators, reminding them of their disclosure obligations and requesting the disclosure of players' personal data under the UK Data Protection Act 1998, which contains an exemption for the disclosure of personal information to third parties for the prevention of crime. Unfortunately for the SBIU and the UK Gambling Commission, it can only ask UK licensees "nicely", but has no powers over overseas licensed operators.

Although most UK bookmakers have already sought refuge offshore, they were still under an obligation to disclose this information under their existing UK licence – if they failed to restructure data protection accordingly. By way of background: under UK law, each company within a group of companies can be a data controller and therefore ultimately responsible for the player data - as opposed to a data processor, who is only allowed to "process" the information. With most UK bookmakers having their headquarters in the UK but their online operations offshore, the main question is: who is the data controller? The headquarters or the offshore online entity? If UK headquarters is the ultimate decision maker about offshore player data, it is deemed to be the data controller and therefore all offshore player data is subject to the UK licence conditions and SBIU's disclosure requirements. In order for player data to remain offshore, the offshore entity must become the designated data controller, with the UK parent having "processing" rights only. This is often ensured through intra-group data processing agreements,

which clarify the responsibilities of each company when data is transferred within the group.

In other words: if UK headquarters is deemed to be the data controller, they will need a considerable amount of good luck in seeking to justify to offshore players why their data is suddenly under UK scrutiny. If, on the other hand, the offshore entity is the "controller", the UK parent is not expected to disclose any information that is outside the UK's control.

This simple structure requires extensive planning, because decisions on marketing campaigns and other permitted use of player data must come from the offshore subsidiary and not from the UK. With the introduction of a new UK licence for offshore operators, however, all the careful planning is "gone with the wind" and online gambling operators can start worrying again whether they prefer breaching players' rights to privacy by disclosing player data, or whether they prefer to breach UK licence requirements by protecting the players' privacy. To avoid regulatory harassment, most operators will comply and disclose player data; however, this scenario is not without its risks: Any indication that the UK licensed entity is a de facto controller brings all the precious data to UK shores and into disclosure territory.

For example: the UK parent only processes data on behalf of the offshore subsidiary, which is the body that has ultimate control over the player data and abides by all the laws on Data Protection in its jurisdiction. The UK parent receives a request to disclose player data from its offshore subsidiary. If the UK parent abides by this request, it has taken on the position of a "controller" and is de facto required to comply with further requests in the future. In addition, it may have breached the data protection laws of the jurisdiction in which the subsidiary is located and – most importantly, as all is about consumer protection nowadays – it may have violated the privacy rights of its players by disclosing their information in the first place.

There have been several reported cases where gambling operators have been sued by data subjects for disclosure of their personal data to sports bodies. One such case was reported in 2009, in which Italian tennis players initiated legal proceedings against gambling operator Interwetten, which had disclosed their personal data (under a memorandum of understanding) to the Association of Tennis Professionals, which in turn suspended the tennis players. Interwetten, as data controller, remained ultimately responsible for breach of data protection and all five tennis players therefore sued Interwetten and not the ATP. If that were to be repeated, then it would be Good News for the UK Gambling Commission and the SBIU, but Bad News for the rest of us…

UK licensed gambling operators will already be accustomed to this "liberal" environment. Some might say, however, that the data will hit the proverbial fan with full force for all newcomers. who will now be required to apply for a UK remote gambling licence and enjoy the British hospitality. With the introduction of UK gambling licences for offshore operators it is only a question of time before disclosure of player data requests arrive even in

New UK licensing requirements

Data Protection and other "unimportant" things to consider…

By Marcos Charif

Article first published in iGaming Business September 2011

the most remote corners of the world.

Introducing new licensing requirements for offshore operators not only means that the offshore entity has to comply with UK Data Protection laws, but also that UK gambling operators have to reconsider their data protection strategies once again. The simplest (legal) answer is to separate UK player data, which will be subject to the new UK Licence, from other player data. How this separation will work once other national licences impose similar disclosure requirements will be fun to watch, with the Italians wanting to see player data from the UK; the UK being interested in a player's activities in France, and the Danish, wanting to please all, will probably share all information with everyone else… a recipe for much fun! The looming data protection problem may well be addressed in Memoranda of Understanding (MoU), similar to the one signed between France and Italy earlier in 2011, however, it does not relieve gambling operators from their obligations, nor enhance their relationships vis a vis their players, given that players can turn around and sue operators for breach of data protection laws simply because a regulator in a previously unconsidered and/or irrelevant location might now have the right to view a player's data because of MoUs. Understanding the scope and effect of MoUs will clearly be the next Big Thing.

Marcos Charif
Harris Hagan