

UK - legal overview

by John Hagan and Melanie Ellis

Article first published in *iGaming Business – The European Legal Outlook*
October 2010

The Gambling Act 2005 (“the 2005 Act”), which came into force on 1 September 2007, regulates all forms of gambling in the UK with the exception of the National Lottery and spread betting. This legislation was introduced to reform the out-dated provisions of the existing legislative framework, including the Betting, Gaming and Lotteries Act 1963 and the Gaming Act 1968 which, for obvious reasons, did not make provision for online gambling.

The 2005 Act created the Gambling Commission as the body with responsibility for regulating gambling in the UK, in accordance with the ‘licensing objectives’ of preventing gambling from being a source of crime or disorder, being associated with crime or disorder or being used to support crime; ensuring that gambling is conducted in a fair and open way; and protecting children and other vulnerable persons from being harmed or exploited by gambling. The Commission’s remit is to permit gambling in so far as it is consistent with these licensing objectives.

The 2005 Act made ‘remote’ gambling licences available to UK operators for the first time, ‘remote gambling’ being defined as “gambling in which persons participate by the use of remote communication”. For the online sector, the key feature of the 2005 Act is that it enables operators based in EEA or ‘white list’ jurisdictions to advertise freely to UK residents, as if they were licensed and regulated in the UK. The white list comprises jurisdictions whose regulatory standards have been judged to satisfy the licensing objectives. Alderney and the Isle of Man were originally included on the list and, since the introduction of the Act, Tasmania and Antigua & Barbuda have been added. Special provision is made in the legislation for Gibraltar, which is treated as if it is an EEA state.

When drafting the 2005 Act, the Government took the view that it was necessary to permit operators based in EEA jurisdictions to advertise in the UK to ensure compliance with EU law, in particular the freedom to provide services to other member states. The addition of a white list recognised that high standards of regulation could be in place in other non-EEA jurisdictions. This approach was admirable but perhaps naïve. At present, the overwhelming majority of online gambling operators targeting the UK are licensed in Gibraltar, Malta, Alderney or the Isle of Man. These operators are enjoying the best of both worlds, as they tap into the lucrative UK market without suffering the burden of UK taxation, regulation and licensing.

The UK Government aspired to lead the way in Europe with its (comparatively) early introduction of a licensing system for online gambling. The UK was to be the ‘home’ of online gambling. However, since the introduction of the 2005 Act, the rest of Europe has moved towards systems of local licensing, whereby all operators wishing to target residents must obtain a local remote gambling licence and pay local taxation. As it appears that such systems, which make local licences available to operators in other member states, are in compliance with European law, the UK’s system is unlikely to be replicated elsewhere in Europe.

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Although UK remote licences are attractive to some operators and there are a number of remote licensees, as the Government points out in its consultation “following the implementation of the Act, no major remote gaming operators chose to relocate their overseas operation in Britain”. For start-up operators with low anticipated turnover, licence fees are often lower than in other jurisdictions, and taxation at 15% of gross gambling turnover may represent a small outlay in comparison with the license fees payable in other jurisdictions, as least until the business model is proven!

The UK’s lofty goals of attracting major remote gambling operators to its shores have, by and large, been scuppered by the subsequent introduction of an unrealistic rate of taxation. For these operators, however, the system has been a huge success, presenting the opportunity to tap into the lucrative UK market whilst paying only the minimal (or non-existent) tax in white list jurisdictions.

UK - licensing requirements and costs

The requirement to hold a UK remote operating licence is based upon the presence of ‘remote gambling equipment’ in Great Britain. The definition of ‘remote gambling equipment’ in the 2005 Act is widely drafted including, for example, any equipment used to store information relating to a person’s gambling or the result. The Gambling Commission has, however, adopted a sensible and liberal interpretation of what falls within the definition of remote gambling equipment. As a result, it is possible for operators to carry out important activities such as customer services, marketing and banking in the UK without holding a licence.

For those who do have remote gambling equipment in the jurisdiction, it is necessary to obtain a remote operating licence from the Gambling Commission and, depending on the size of the business, key members of staff may also need to obtain person management licences. Operating licences are unlimited in duration (unless surrendered or revoked) but an annual fee is payable. UK licensees are subject to a tax of 15% on gross gambling profits, the horseracing betting levy (where applicable) and are obliged to make a contribution to research, education and the treatment of problem gambling.

The cost of a remote operating licence varies quite substantially according to two factors: the type of gambling services that are to be offered and the anticipated annual gambling yield. At the lowest end of the scale, those applying for a pool betting licence with a gambling yield of under £5.5m per year will pay an application fee of £651 and an annual fee of £1,594. At the other extreme, a remote casino operator with turnover of over £500m would pay an application fee of £63,671 and an annual fee of £155,425. Personal management licences, if required, are £370 each and this fee is payable every five years to maintain the licence.

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To qualify for a UK licence, it is not necessary to be a UK resident or a UK company, nor is it necessary to have all remote gambling equipment in the UK. However, it is necessary to have some equipment in the UK and the Gambling Commission would be most unlikely to award a licence to an applicant with no real connection to the jurisdiction. Aspiring operators must demonstrate to the Commission that they will operate in accordance with the licensing objectives. To this end, applicants must submit details of the policies and procedures they have in place to protect young and vulnerable persons, to prevent their business from being associated with crime and disorder, to promote social responsibility in gambling and to operate in a fair and open way.

From submission of the documents to the Gambling Commission, the application process tends to take around 8 to 12 weeks. However, for larger or more complex applicant companies and in relation to novel types of gambling product the process can take longer. The Gambling Commission allocates a case worker to consider the application in the first instance, and this person will usually raise with the applicant a number of queries arising from the documents submitted. Correspondence with the case worker can normally resolve any concerns, resulting in the grant of the licence, however in some cases the decision will be referred to a Regulatory Panel hearing, which takes place at the Commission's offices in Birmingham.

Licensed online operators must adhere to the "Licence Conditions and Codes of Practice" and the remote gambling software Technical Standards put into place by the Gambling Commission. These are as comprehensive and rigorous as you would expect in such a highly regulated jurisdiction. Licensees must also submit annual or quarterly regulatory returns, providing the Commission with key information and data concerning their operations and any compliance issues they may have experienced.

Operators based in EEA countries or white listed jurisdictions may currently advertise their services in the UK to the same extent as UK licensees, without holding a UK licence. For all other operators, it is an offence to advertise gambling in the UK. In relation to accepting bets from UK residents, however, no offence is committed regardless of the location of the operator, the only exception being in relation to lotteries. UK, EEA and white list operators advertising in the UK must all comply with the Advertising Codes of Practice issued by the Committee for Advertising Practice and enforced by the Advertising Standards Authority. These codes include specific provisions in relation to advertisements for gambling services, for example that gambling adverts must not be designed so as to be of particular appeal to children.

Operators targeting the UK should also comply with the Gambling Industry Code for Socially Responsible Advertising. Although voluntary, operators have agreed to comply with the Code, particularly in view of the fact that the Government has the power to create a compulsory code if necessary.

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The Code includes a 9pm watershed for gambling advertisements, with the exception of bingo and sports betting advertised around sporting events. The Code also includes a requirement to carry the website address www.gambleaware.com on all advertising where it is “feasible, practical and necessary” to do so.

UK – the future

In January this year, the Minister with responsibility for gambling announced proposals to review the current system of online licensing and introduce a requirement for all operators targeting the UK to hold a UK licence. Initially, the review was introduced in the context of ‘creating a level playing field’ for UK based operators, however its purpose has transformed somewhat since then to focus on ensuring protection for UK players. If the proposals come into force, a UK licence would be required not only to advertise gambling services to the UK, but also to transact with British customers.

The proposals follow the recent online departure from the UK of well known high street bookmakers William Hill and Ladbrokes, who found that UK remote betting duty was preventing them from competing effectively with overseas-licensed betting operators. The proposals also come in the wake of changes to the regulatory landscape in Europe, with France and Italy leading the way by creating systems with a local licence requirement, and emerging trends in ECJ case law supporting these developments.

The implementation of this proposal would involve amendment of the 2005 Act. Specifically, a licence would be required to transact with British customers and it would be a criminal offence to do so without a licence. It is proposed that this offence would cover any transaction with a person “ordinarily resident in Britain”, encompassing any person registering with a British residential address, bank account or IP address. This wide definition would include both British residents travelling overseas (who would register using a British address or bank account) and foreign individuals visiting Britain (who would register using a British IP address). The introduction of this new offence would affect not just EEA and white list operators, but also operators from around the world who currently transact with UK residents despite not being permitted to advertise to them.

The Government proposes that the white list will be retained so as to enable operators currently licensed in those jurisdictions to retain equipment, staff and other functions there. It is envisaged that the Gambling Commission would work with regulators in white list jurisdictions with a view to minimising duplication of investigation and compliance checks. If a UK licence does become a requirement, in our opinion there remain significant advantages to remaining in a white list jurisdiction, not least the significant savings in corporate tax.

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Also, it is likely that for white list operators, the UK application process will be quicker and easier as the Commission can rely to a certain extent on the checks already carried out on the operator, and the fact that they are already operating legally in an approved jurisdiction. For those also targeting jurisdictions other than the UK, a white list licence (for example the business to business licence available in Alderney) may be able to be used in conjunction with licences in other jurisdictions such as France or Italy.

The proposals were subject to a consultation period, which ended on 18 June 2010. The Government received responses to the consultation from a variety of interested parties including online operators licensed in the UK, those licensed abroad and white list and European governments and regulators. The UK Gambling Commission has not provided a (publicly available, at least) response to the consultation, but our understanding is that it is supportive of the proposals. Perhaps unsurprisingly, the proposals are broadly supported by UK licensees and opposed by those based in white listed jurisdictions, who are of course currently having their cake and eating it too.

White list operators, governments and regulators emphasise that those operating out of white list jurisdictions are not seeking to avoid high standards of regulation, but rather simply taking advantage of the significant tax savings. The white list jurisdictions, whose standards of regulation have been judged to be comparable to those in the UK, feel they should be treated differently to EEA jurisdictions whose standards have not been assessed by the UK government. On behalf of stakeholders in the remote gambling industry in Malta (an EEA jurisdiction), the Malta Remote Gaming Council responds that the proposals are “not sufficiently justified” and “disproportionate”. The States of Alderney’s consultation response asks the question “if the system is not broken, why is the UK Government trying to fix it?” PartyGaming, a Gibraltar licensee, states that “If the primary motive is to preserve consumer protection then we would question the need to alter the regulatory set-up which is working well” and concludes, given the lack of evidence presented to the contrary, that the vast majority of sites accessed by UK players are already well regulated.

Whilst the consultation ostensibly focuses on customer protection issues a number of respondents have pointed out that the issues of tax and regulation cannot be considered separately. Funding issues must surely be at play, both in terms of taxation and the financing of the regulatory system, but in light of recent rulings of the European Court of Justice it is clear that a system which does not allow European companies to operate freely in the UK should be founded on player protection concerns, rather an aim of raising revenue.

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Betfair, as a UK licensed operator, supports the proposals but suggests that if the new system is to work, the UK's online gambling tax must not be a "significant disincentive" and the tax regime must be "commercially viable to operators". Ladbrokes expresses the concern that if the cost of regulation is too high, there is a risk that unregulated operators will gain ground due to their competitive advantage. Indeed, the Government acknowledges in the Consultation the difficulty of enforcing a licence requirement, given the mixed evidence as to the effectiveness of measures such as ISP blocking and financial transaction blocking. The general election which took place during the consultation period, resulting in a new Government, has, inevitably, delayed any final decisions being taken. The proposals do, however, 'tick all the boxes' from a political and regulatory perspective. The substantial tax revenues would be welcome in the current economic climate, and the taxation of offshore entities in general, and gambling companies in particular, is always popular. The proposals would also ensure a consistent level of consumer protection, not least for those playing on sites offered by operators based in certain emerging eastern European jurisdictions (an area of concern identified by the Government in its consultation).

Nevertheless, overseas operators will be delighted to hear that our soundings, combined with the lack of any further statement by the Government following the end of the consultation period, suggests it currently has no appetite for making changes in the political minefield that is gambling. Amendments to the primary legislation would be required, and the tax revenues that would be generated do not appear to be regarded as significant in the overall scheme of things. In the meantime, operators should certainly keep this issue under review as we believe it is likely to raise its head again as and when Government legislative priorities permit.

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October 2010