

## The regulation of remote services under the Gambling Act 2005

One of the major changes for the UK gambling industry brought about by the new Gambling Act 2005 ("Act"), but not the most widely publicised, is the legalisation of remote gaming operations in this country. Whilst online betting has always been permitted under the Betting, Gaming and Lotteries Act 1963, the Gaming Act 1968 prevents the establishment within the UK of an online or other remotely operated casino. However, the new regime allows the Gambling Commission to issue licences to operators wanting to offer their services via remote means and should remove the need to structure as betting products what might otherwise be regarded as gaming.

Section 4 of the Act sets out the definition of remote gambling, and this section is one example of the flexibility that the Government has tried to incorporate into the Act. Remote gambling is defined as gambling in which people participate by the use of "remote communication". Remote communication means communication using the internet, telephone, television, radio or "any other kind of electronic or other technology for facilitating communication". This is designed to cover all forms of gambling where players are not face to face in the same room. It is clearly very broad and would include mobile telephony as well as future means of communication. However, the Secretary of State is given the power to make regulations providing that particular methods of communication are or are not to be considered to be "remote" for these purposes, which should hopefully enable these provisions to be applied sensibly on a case-by-case basis.

Below we look at some of the key issues for remote operators arising out of the legislation.

- **Provision of Facilities for Gambling**

This is a key concept in the Act. The principal offence in relation to remote gambling is, essentially, the provision of facilities for gambling without the requisite operating licence. In addition, the provision of facilities for gambling is the concept used to determine who does and does not need to be licensed in relation to a remote gambling operation.

Section 5 of the Act sets out the circumstances in which a person provides facilities for gambling for these purposes. This is the case if a person either:

- (i) invites others to gamble in accordance with arrangements made by him. (According to the explanatory notes to the Act, this is aimed at those who are in the business of providing gambling services, such as casino operators or bookmakers); or
- (ii) provides, operates or administers arrangements for gambling by others. (The distinction between this and (i) above is not entirely clear, although the explanatory notes to the Act state that "administers" is intended to imply a general notion of control over the gambling operation);  
or

- (iii) participates in the operation or administration of gambling by others. (This provision is aimed at employees who are directly involved in gambling, such as card dealers and people providing administrative support).

The above definition is very wide and, despite the explanatory notes, further clarification is certainly going to be required in the form of guidance from the Gambling Commission. There are also a number of exceptions to the above. People supplying goods, such as personal computers, which could be used for gambling purposes are not caught by this section. There is also an exception in section 5(2)(c) for those who make available facilities for remote communication to operators and players. This is designed to prevent internet service providers and other communication network operators, such as mobile network operators or interactive television platform operators (eg. BSkyB), from falling within the ambit of the Act but is in fact drafted more widely and would appear to catch, for example, internet café owners.

However, there is an important caveat here. Under the Act (section 5(3)), a person will be considered to be providing facilities for gambling despite the exception in section 5(2)(c) where the remote communication facilities are "*adapted or presented in such a way as to facilitate or draw attention to the possibility of their use for gambling*" and "*the nature, adaptation or presentation of the facilities is such that (i) they cannot reasonably be expected to be used for purposes other than gambling or (ii) they are intended to be used wholly or mainly for gambling.*" The idea behind this provision is that, as is currently the view of the Gaming Board under the existing legislation, operators should not be able to circumvent the requirements for premises licensing by providing access to the internet, but then adapting computers so that users are directed straight to the online gaming sites.

- **White Labelling**

Particularly in anticipation of deregulation, many brand owners have wanted to cash in on betting, gaming and lottery services. However, relatively few businesses have the software, expertise and administrative back up needed to operate a service of this sort. Under the current legislation, brand owners can launch remote betting services under their own brands but with the back end functionality for the operation being provided by someone else, so-called "white labelling". The site can look to all intents and purposes as if it is the site of the brand owner, provided that the terms and conditions for the site make it clear that, in fact, the service is provided by or "powered by" someone else. Broadly in these circumstances there is no need for the brand owner to be licensed.

But the position may be different under the new Act. As noted above, the concept of providing facilities for gambling is drafted very widely. Arguably, a brand owner in a white labelling arrangement could be said to be providing arrangements for gambling by others or participating in the operation of gambling by others, both of which would require the brand owner to be licensed under the new regime. It is not thought that the intention of the new legislation is that brand owners be regulated in this way and it is to be hoped that this will be made clear in guidance which will be issued by the Gambling Commission. However, there is no mention of white labelling in the explanatory notes to the Act, despite lobbying by remote operator associations.

The ability of brand owners to offer white-labelled services to their customers may also be affected by the provisions in the Act on advertising, as detailed below.

- **Territorial Application**

The Act also addresses the issue of territorial application, which is particularly important in the context of remote services. Essentially, the Act provides (in section 36(3)) that remote operators only fall within the scope of the offence of providing facilities for gambling if at least one item of "remote gambling equipment" is located in the UK. Remote gambling equipment is defined as "*all electronic or other equipment used by or on behalf of a person providing facilities for remote gambling:*

- (i) to store information relating to a person's participation in the gambling;*
- (ii) to present, to persons who are participating or may participate in the gambling, a virtual game, virtual race or other virtual event or process by reference to which the gambling is conducted;*
- (iii) to determine all or part of a result or the effect of a result, [e.g. a random number generator]; or*
- (iv) to store information relating to a result."*

However, this does not include equipment used by a person to take advantage of remote gambling facilities provided by someone else, e.g. a user's home computer, provided that that equipment has not been provided by the person providing the gambling facilities (section 36(5)). The effect of this definition is that if an operator locates, in the UK, any equipment which falls within the definition, then it will have to be licensed and regulated by the Gambling Commission. The list of remote gambling equipment set out above has been reduced since the first version of the Gambling Bill published in 2003, when it also included equipment for accepting payment, for example. The definition does still, however, leave a number of difficult issues for the Gambling Commission to resolve.

Firstly, there is no definition of "equipment" in the Act. Equipment does appear to be different from "software" and the licensing of software providers is dealt with separately (see below). However, although the Act does not define either of these terms, the distinction between gambling equipment and gambling software will be key. For example, if "software" were to be considered to be "equipment" for the purposes of the Act, the installation and use of software by individuals in the UK in connection with gambling could be sufficient to bring the operators of those gambling services on-shore, even where all of the operator's physical equipment is located outside the UK. This cannot be the intention of the Act. In any event, "equipment" would seem to suggest tangible items of some sort and, furthermore, items that have an element of functionality, i.e. not just storage facilities.

Secondly, "remote gambling equipment" encompasses servers and other equipment used to store information relating to a person's participation in gambling, i.e. an operator's customer database. Whilst this information may, for a foreign operator, be located principally outside the UK, there are likely to be circumstances where an operator will want to transfer this data into the UK, for example, should the operator engage a customer relations management agency in the UK. Again, white-labelled sites might also find this provision problematic, most notably if a UK based brand owner enters into a white-labelling arrangement with a foreign operator but wants to have access to data collected by the operator about (essentially) its customers.

Thirdly, as noted above, the effect of the Act is to require an operator locating any of its remote gambling equipment in the UK to obtain a licence from the Gambling Commission. In addition, section 89 contains the now infamous "all-in-all-out" test whereby it will be a condition of a remote operating licence that the operator locates all of its remote gambling equipment in Great Britain. The scope of the definition of remote gambling equipment needs to be clarified so that operators based in other jurisdictions (and which wish to remain there) do not find themselves inadvertently requiring a licence in the UK and thereby being obliged to transfer all of their equipment to this country. The Gambling Commission does have the power to exclude this condition from a licence, provided that it is satisfied that the key licensing objectives (namely protecting the young and vulnerable, keeping crime out of gambling and ensuring fairness for customers) can be met, although it remains to be seen how the Commission will exercise this power.

- **Software Providers**

In the bricks and mortar casino world there are stringent regulations regarding the way in which casino games can be played. The purpose of these is to ensure that customers are not exploited by unscrupulous operators skewing the odds in their favour. The Government was keen to ensure, particularly in the online environment, that sufficient safeguards were put in place to ensure fairness for customers. As a result, under the Act, licensing requirements are placed on the providers of software to be used in online gambling operations.

Broadly, under section 41 of the Act, an offence is committed if, in the course of business, a person "*manufactures, supplies, installs or adapts*" computer software for use in connection with remote gambling, other than in accordance with an operating licence. Again this provision is very wide and potentially means that a number of software providers, whose software is used for a variety of applications, not just remote gambling, would have to obtain an operating licence. Expressly carved out, however, are network operators whose communications networks enable customers to download software to their computers for use in remote gambling.

Whilst this section is, we understand, principally aimed at regulating those who actually generate the software used in gambling applications, its ambit is potentially much wider and, without further clarification, could suggest that an operator based outside the UK may need to be licensed in order to provide its customers with the software necessary to take advantage of its services.

- **Advertising**

The current position on the advertising of remote offshore operations is somewhat anomalous. Whilst off-shore gaming operators do have some scope to advertise here (to a greater extent, in fact, than UK bricks and mortar casinos), off-shore bookmakers are subject to strictly enforced prohibitions enacted as a means of protecting tax revenues. Under the Act, the advertising of all types of remote gambling operations will be regulated in the same way.

The Act does not contain substantive rules regarding advertising of gambling products. Rather it provides for the Secretary of State to make regulations controlling the advertising of gambling. Broadcast advertising of gambling services will remain within the remit of Ofcom (and the Advertising Standards Authority). Currently the Ofcom advertising code prohibits the advertising of gambling

services on television and radio, with key exceptions being football pools, bingo and the National Lottery. There are also restrictions on the sponsorship of programmes by gambling companies (although there is currently an anomaly in that these companies can sponsor certain programmes but cannot buy spot advertising time). The Act requires Ofcom to review and revise its standards in respect of gambling advertisements in consultation with the Gambling Commission and Ofcom is expected to amend the existing rules to ensure consistency with the new regime, although this is unlikely to happen before the Secretary of State has issued regulations controlling the non-broadcast advertising of these types of services.

In any event, guidance will certainly be required on the application of the advertising provisions of the Act and any regulations made under it. The definition of advertising contained in the Act is very wide and includes doing anything to encourage people to take advantage of facilities for gambling or, with a view to increasing the use of such facilities bringing people's attention to information about those facilities. Because of the broad nature of the definitions of advertising and of the concept of providing facilities for gambling, there is a risk of overlap between the two, which is something that the Gambling Commission will need to consider. In addition, the definition goes on to specify that "advertising" includes arrangements, such as sponsorship and so-called "brand-sharing" under which a name is displayed in connection with an event or product where either:

- (i) the provision of facilities for gambling is the sole or main activity; or
- (ii) *"the manner or context in which the name is displayed is designed to draw attention to the fact that facilities for gambling are provided under that name".*

The first limb of the above provision makes it clear that it will not be possible for non-EEA operators to sponsor events or, for example, programmes in the UK. However the second limb would appear to be more problematic and could arguably have implications for white labelling arrangements where the operator of a brand owner's site is based offshore. Section 333 sets out the position on the territorial application of the offence of advertising foreign gambling and provides that advertising is caught by this offence if (inter alia) it involves: "...

- (c) *making data available with a view to its being accessed by one or more persons in the UK, or*
- (d) *making data available in circumstances such that it is likely to be accessed by one or more persons in Great Britain."*

Clearly either of the above 2 provisions will capture the situation where a brand that is well known in the UK is associated, by way of a white labelling arrangement, with an off-shore (i.e. non-EEA) remote gambling service. Therefore, the danger will be that by attaching its brand to a non-EEA operated site, the brand owner brings itself within the offence of advertising foreign gambling as its name is being displayed so as to draw attention to the fact that gambling facilities are provided.

After a change in the Government's initial approach to advertising by foreign operators in the UK, the Act contains a blanket restriction on all advertising (as defined above) of remote gambling operations regulated by a non-EEA member state. Gibraltar is deemed to be an EEA member state for these

purposes and, in addition, the Secretary of State will have the ability to deem other countries outside the EEA as being EEA member states; this is the so-called "white list". As the Isle of Man and Channel Islands are not in fact part of the EEA, both territories have made applications to the Secretary of State to be included on this white list. However, by including them, the Government may well be reducing the chances of remote operators moving on shore as it will be open for operators to remain established in those jurisdictions and still promote their services to UK residents.

This approach of allowing operators based in other EEA jurisdictions to advertise their services to UK customers has been controversial and, despite recent developments in European law regarding gambling services generally, is not being followed by other member states. For example, the Italian Parliament is currently debating a proposal whereby any type of advertising in Italy of any foreign-based gambling services will give rise to a criminal offence.

- **Taxation**

The view of the regulators appears to be that being licensed by a respected body such as the Gambling Commission will have an inherent value in itself, as consumers will feel more comfortable playing on a UK regulated site rather than a potentially unregulated site based on the other side of the world. However, this is not necessarily a view shared by operators themselves, particularly those based in jurisdictions that have worked very hard in recent years to establish regulations that customers feel they can trust. Also, since at least some off-shore operators will be able to advertise here, it is perhaps hard to see the attraction of relocating entire businesses, together with equipment and staff, to the UK.

Whilst the regulatory regime is of course important, other factors will also influence where an operator decides to establish its online gambling business. The state and availability of the necessary technological infrastructure is a key deciding factor and this is something that the UK certainly scores highly on compared to other smaller jurisdictions with less available bandwidth and fewer qualified technical staff.

However, the tax position will be the key factor for most operators. Not only is it a question of gambling tax, but also corporation tax, VAT and employment costs such as employers' National Insurance. All of these add to the cost of operating in the UK. Furthermore, there are regulatory costs to consider – the level of licence fees and compliance costs may also deter operators from moving to the UK. If these costs are set at a level that is financially uncompetitive as against other jurisdictions, coupled with the fact that operators in those jurisdictions may well be able to advertise freely in this country, the work that has gone into producing the Gambling Act and the creation of a scheme for regulating gambling in the online world may be in vain.

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