Memery Crystal

Memery Bank

Remote Gambling Reform in Britain: Is the Government turning its back on free trade?

Peter Wilson reviews the recent announcement by the Minister of Sport that would require British operating licences for all gambling businesses located outside the UK.

Back in 2003, when the previous (Labour) Government was working out the details of what is now the Gambling Act 2005 ("the Act"), it considered, and then pointedly rejected, the option of requiring all offshore operators to obtain a British licence if they wanted to transact with British residents. In a phrase that has come to haunt it, the Government virtuously claimed it, *"...favours a much more free market approach. This is the preferred option as it is the one that most closely matches the Government's vision of a global market where a well regulated British based industry is able to establish itself as a world leader"* (from "The Future of Remote Gambling").

Yet less than three years after the Act was implemented, the policy of a free market approach was jettisoned when in January 2010 the Government announced proposals for new licence requirements for overseas based firms who want to supply customers in Britain.

Of the options set out in a March 2010 Consultation paper, the Government said at the time that it favoured developing a more streamlined white listing process as well as introducing licensing for operators in white listed jurisdictions. Not good news for the regulators in Alderney, Isle of Man, Tasmania and Antigua but it could have been worse if one of the other identified options had been adopted which involved abolishing the white list in its entirety.

But that is exactly what will happen with the current proposals when the Minister of Sport announced in July 2011 that the white list will be *"phased out"*, for which read - terminated as surplus to requirements. If and when implemented, the changes will mean that all gambling businesses located outside the UK will require a British operating licence if they wish to transact with British customers. If they do not, or cannot get one, they will no doubt commit a criminal offence if they continue to supply gambling services to British customers.

Currently, there are four categories of operator who can legally transact with British residents without obtaining a British licence:

- Operators subject to the regulation of a European Economic Area ("EEA") State - meaning those in one of the 27 EU members, Norway, Liechtenstein or Iceland;

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- Gibraltar Licensees - as Gibraltar is treated as a EEA state under the Act;
- White List Licensees – meaning those included in regulations made by the Secretary of State and treated as though they are EEA states (namely Alderney, Isle of Man, Antigua and Barbuda and Tasmania);
- Operators in Non-EEA states – who are prohibited from advertising in Britain or, broadly speaking, targeting British residents with their internet, TV or radio (i.e. remote) advertising but not prohibited from transacting with British based customers who find them on the web (e.g. sites in Costa Rica, Curacao, the Philippines, Kahnawake etc).

When the Act is amended the four categories will be reduced to one, you either have a British licence or you don't. In a move that draws much of the regulatory sting out of the proposed new law, the Minister indicated that there would be a transitional provision whereby all gambling operators that hold an existing licence in the EEA or a white list jurisdiction will be automatically eligible for a British licence. This avoids both the difficulty of a potential legal challenge if an established operator were refused and relieves the Gambling Commission ("GC"), of undertaking a lot of due diligence in a short period of time; as it is already concerned about the increase in workload. All it needs to do then is to collect the licence fee.

Both the Minister's statement, and a statement by the Economic Secretary to the Treasury which followed hot on his heels, are short on detail. With remote licence fees for sports betting currently ranging from £3,259 to £28,641 on application and from £13,529 to £155,425 annually, depending on turnover, there could be a hefty price to pay for what in most cases will be a second national licence and for larger operators, their third, fourth or more.

As to the tax, remote gaming and betting duty is 15%, whereas in many offshore licensing jurisdictions it is a fraction of that or even zero. The Treasury said it would look at *"taxing operators on the basis of customer location"* as well as considering *"ways to prevent operators in the UK being subject to double taxation on remote gambling in the shorter term."*

It sounds like offshore operators will have to pay remote gambling duty on their business with British customers but not otherwise; and hopefully that also means existing British based licensees will not be taxed on their non British business if they can show that they are already paying duty to another State at an equivalent rate.

There will be additional administrative and ongoing compliance expenses. The Government has previously considered (in the March 2010 Consultation) several ways in which the GC could check on compliance by offshore licensees including:

- *"A mirrored, tamper proof server containing a full copy of gambling transaction records*
- *A regulatory representative in Britain*
- *A UK registered company and certain office functions in Britain*
- *More enhanced regulatory returns*

As to suspicious betting patterns, it is in the interest of the reputable operators to provide such information already whether or not they are licensed offshore. If others do not, it is difficult to see what the GC will be able to do about it.

- *A bond lodged in Britain or payable to the Commission in the event of default"*

Add to this the cost of internal monitoring, reporting, and reviews (however light the touch), and you are looking at a not inconsiderable cost to the business. One might ask, is it really necessary? Or, to put it another way, why is a change in the law being proposed at all?

It is not driven by the European Commission, as the Green Paper "On on-line gambling in the Internal Market" published in March 2011 poses the question whether there should be greater not less mutual recognition of different licensing regimes across the EU. There does not seem to be a significant issue with problem gambling arising as a result of the current licensing structure, at least not one highlighted in the most recent Gambling Prevalence Study 2010. It is not clear how the Government's proposals fit in, if at all, with the announcement in May 2011 by the Culture, Media and Sport Committee of a new inquiry into the implementation and operation of the Act. One of the issues that the Committee will be looking at is none other than, *"The impact of the proliferation of off-shore online gambling operators on the UK gambling sector and what effect the Act has had on this".*

The reasons given by the Minister for requiring offshore operators to be licensed in Britain are not entirely convincing. He expresses concern that British consumers face different consumer protection arrangements, have to deal with a myriad of different regulators, deal with different languages and that it is unfair that overseas competitors can access the British market without sharing the costs of regulation. He claims that the proposals will ensure that British consumers really enjoy a consistent standard of protection no matter which online gambling site they visit. That is an exaggeration as British consumers would still be able to visit any gambling site they wish, located anywhere in the world, whether it has a British licence or not. Since the Government rejected ISP and Financial Transaction blocking (at least for the time being) as not being effective enough, it is difficult to see how the Minister's claim is correct.

In any event, according to the white list criteria, jurisdictions could only be admitted to the list if they had values similar to Britain's and had effective enforcement. Since no jurisdictions have been removed from the list as yet, one must assume that the Government does not have any particular concerns. Anecdotal suggestions of consumer concern are one thing, hard evidence is another.

As to suspicious betting patterns, it is in the interest of the reputable operators to provide such information already whether or not they are licensed offshore. If others do not, it is difficult to see what the GC will be able to do about it. The Consultation paper has already rejected the idea of introducing offences with extra territorial effect.

Further, the reference to facing a myriad of different languages is a red herring. It seems hard to imagine that those targeting the British market will use anything other than English on their website and British consumers who are not fluent in foreign languages are unlikely to want to transact with a website that is in any language other than English. On the

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question of fairness, the proposed new regime will still not provide British located operators with a level playing field if they are still paying 28% Corporation Tax and their competitors are paying zero or negligible corporate tax. Unless the GC is proposing the reducing its licence fees, which is unlikely with an increased compliance burden to administer, or the Treasury will really give them some gaming duty relief, then it is difficult to see how extending licences to overseas operators is going to provide those already licensed here with any perceivable benefit. Certainly, it will be more revenue for the Government but, if anything, it is likely to lead to less competitive pricing for consumers.

It looks like the proposals are opportunistic. Since the European Commission has accepted the principle of national licensing schemes, such as in Italy and France, the UK is having second thoughts about the extent of its Treaty obligations to free trade in the EU. At the same time, it is widely recognised that in the absence of any tax benefits or other sufficient incentives, the remote licensing scheme under the Act has not been a success. Not only has it failed to attract any major operators to become licensed here, but it has seen several, if not most, larger businesses leave. A passage about remote gambling in the GC's annual report 2010/11 is quite revealing when it reports:

> *"During the year Betfair joined other operators in relocating their betting operations offshore. This means they no longer fall under the scope of the Act and increases the proportion of gambling operators targeting British consumers from abroad. At the same time the European market continues to follow the trend of introducing national licensing regimes for remote gambling with many jurisdictions favouring a controlled opening of markets to include limited types of gambling."*

It seems to be a case of "if you can't beat them, force them". Of course, requiring all the offshore sites who transact with British consumers to obtain licences and pay gambling tax will boost State revenues during a time of austerity. It is also one tax measure that is likely to be popular with most consumers.

Citing the moves towards national licensing schemes in other parts of the EU is not comparing like with like either. Whereas moving from a strict monopoly to commercial licensing on a national basis could be described as "controlled opening", changing the British system from an open commercial licensing model (excepting the National Lottery and the Tote) to a national scheme is more like a "controlled closing". It took many cases before the European Court of Justice before a formula could be found that met the EU law requirements that restrictions on gambling should be necessary for genuine public policy reasons, non discriminatory, and proportionate and not simply to increase State revenue. If the Government want to avoid the possibility of legal challenge or even just cynicism about the proposed new regime then it should be putting forward convincing evidence of a need for change.

Peter Wilson
T +44 (0) 20 7400 5807
pwilson@memerycrystal.com

44 Southampton Buildings
London WC2A 1AP
T +44 (0) 20 7242 5905
F +44 (0) 20 7242 2058
www.memerycrystal.com
LDE No: 156 Chancery Lane

About the Author

Peter Wilson *is a partner at Memery Crystal specialising in gambling and business investigations. His gambling practice has built up over 20 years expanding from advising UK land based businesses to an international igaming practice with clients in over a dozen jurisdictions. Peter is known for his comprehensive industry knowledge and sensible, practical advice. He has been recognised as a leading individual in the area of gaming law by both Chambers UK and The Legal 500.*

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