

New Internet Gambling Regulation and Taxation in Great Britain

By Tony Coles

Many readers will be aware that in 2005 the UK enacted a new Gambling Act¹. That Act was intended to update the law governing all types of gambling and introduced a modern and specifically forward looking approach to the regulation of gambling in the UK. One of the main provisions of the 2005 Act was that all kinds of gambling would be regulated on the same basis and that the way a player accesses gambling would not affect its regulation more than is necessary. Thus gambling on the Internet, or via any other electronic device, was to be regulated as “remote gambling,” so far as possible in exactly the same way as gambling at a brick and mortar site (“non-remote” gambling).



The 2005 Act acknowledged that remote gambling could, and would, be made available across national boundaries and because the UK is a Member State within the European Union, the Act addressed how this state of affairs should be reflected. The Act thus provided that where remote gambling was regulated in another Member State within the European Union (“EU”) or, indeed, another Member State within the European Economic Area (“EEA”)² that gambling could be made available to players in Great Britain in exactly the same way as if it were regulated by the British Gambling Commission. This has meant that under the regime set out in the 2005 Act, Internet gambling has been regulated at its place of supply (the jurisdiction where the operator is based) rather than its place of consumption (where the player sits).

Furthermore, because the 2005 Act is solely a regulatory enactment, UK taxation is dealt with under separate provisions with the result that once the 2005 Act came into effect, remote gambling operators based outside Great Britain, but elsewhere within the EU/EEA, paid only the taxes of the Member State in which they were regulated even though many of their players were actually in Great Britain.

Alongside this the 2005 Act, the British Government introduced arrangements for the establishment of a so-called “white list.” In the years before 2005, many Internet gambling operators had chosen to operate from, and thus be regulated by, one of several jurisdictions which, while not part of the UK, are associated with it. As a consequence, arguments were advanced by Alderney, the Isle of Man and Gibraltar that their respective regulatory

regimes were sound and well established, and that it was appropriate that they should each have the same status as jurisdictions in the EU/EEA. These arguments were accepted with the result that the 2005 Act provides that the same principles applied to jurisdictions on the so-called “white list” as to those in the EU/EEA. A procedure was adopted for the UK Government to create the “white list” and “white listed” status was granted to Alderney, the Isle of Man, Tasmania and Antigua, Gibraltar itself being sufficiently associated with the EEA.

It is thought by many that the 2005 Act and its operation by the British Gambling Commission worked reasonably well, but the current UK Government (formed following the 2010 General Election by a coalition of the Conservative and Liberal Democrat parties replacing the earlier Labour Party Government) decided that changes were required so as to introduce new arrangements for the regulation of remote gambling for British players. In mid-2011 new legislation was announced to amend the 2005 Act so that all remote gambling operators who deal with British players would need a licence from the British Gambling Commission regardless of where those operators were already licensed. The previous acceptance of an EEA/“white list” jurisdiction licence will no longer apply with the result that for the

¹ The Gambling Act 2005 was passed into law by the Parliament of the United Kingdom of Great Britain and Northern Ireland. But the Act only has effect in Great Britain (i.e. England, Scotland and Wales). The Province of Northern Ireland had, and continues to have, its own separate regime for the regulation of gambling. References in this article to United Kingdom (“UK”) should therefore be read in this context.

UK licensing is changing to a “point of consumption” basis. This announcement of changes in the 2005 Act was accompanied by a second announcement that taxation of remote gambling by British players would also change to a “point of consumption” basis.

To achieve the changes in the 2005 Act, the UK Parliament has now passed the Gambling (Licensing & Advertising) Act 2014, parts of which come into force as transitional arrangements, with the remainder coming into effect at the beginning of October. The 2014 Act has extended the territorial application of Section 33 of the 2005 Act so as to require all remote gambling operators to obtain a licence from the British Gambling Commission if they want to do business with people located in Great Britain. So if at least one piece of remote gambling equipment used in the provision of facilities by an operator is situated in Great Britain or, even if no such equipment is in the UK and an operator’s facilities are capable of being used by players in Britain, a licence is required.

The 2014 Act has also abolished the offence of “advertising foreign gambling” but extended the territorial scope of “advertising unlawful gambling” (Section 330 of the 2005 Act) and the regulations controlling the advertising of remote gambling by way of remote communications (Section 328). Although not related to remote gambling, one of the effects of this change is that it is no longer illegal to advertise in Great Britain non-remote gambling elsewhere in the world. This, therefore, removes the restrictions which since 2005 have prohibited casinos in, for example, Las Vegas from advertising in Great Britain.

In introducing the changes in its 2014 Act, the UK Government has maintained that the system introduced in 2005 was flawed and did not properly protect British players. It advanced a number of detailed reasons in support of the changes although some believe that a main, if not most important, reason for the 2014 Act is that it will enable the UK Treasury (i.e. the UK Finance Ministry) to tax all remote operators on all revenue which they receive from the participation of British residents. Readers will know that such a fiscally based reason would be inconsistent with the jurisprudence of the Court of Justice of the European Union - and the UK Government has been cautious in aiming to ensure that its legisla-

tion complies in full with UK’s commitments as a Member State in the EEA. So a consequence of changes in the social legislation (i.e. the 2014 Act amending the 2005 Act) which would seem to satisfy the European Court’s jurisprudence may well be that the change in taxation status which is being introduced will not be inconsistent with the EEA Treaty obligations of the UK.

With the 2014 Act in force, and with the publication of all of the secondary legislation (principally the Gambling (Licensing & Advertising) Act 2014 (Transitional Provisions) Order 2014), the British Gambling Commission has set about implementing the new regime. This includes machinery for those currently licensed in an EU/EEA/“white list” jurisdiction to attract “continuation rights” so long as they submit an advance application by 16 September 2014. Even if the Commission has not finally determined an advance application before the new law comes into force on 1 October 2014, those licensees holding “continuation rights” will be issued a “continuation licence” which will authorise them to operate in the UK until the outcome of their application is known. But for remote gambling operators who wish to do business in the UK but have not been licensed in an EU/EEA/“white list” jurisdiction, an entirely new application has to be made to the Commission, and operators will be committing an offence in the UK if they do business with British players after 1 October 2014 without a British licence.

Side by side with the introduction of the 2014 Act, the Gambling Commission has implemented a new compulsory on-line application process. This on-line application aggregates the contents of the IAGR Multi-Jurisdictional Business Form and the British Commission’s UK Jurisdiction Rider. For those EEA/“White List” applicants applying under the transitional provisions, the Commission has identified a smaller subset of questions.

There is also the need for relevant key personnel of each licensee to hold a personal licence. The provisions under which the different kinds of personal licences are required, and the machinery for seeking them, are complex and beyond the scope of this article but those doing business in the UK should appreciate that they must prioritise the submission of personal licence application(s) along

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with the main application itself. To this end the Commission has launched new forms and personal declarations and identified new requirements for those requiring such personal licences.

Also with the passage through Parliament of the 2014 Act, the British Gambling Commission has introduced changes to its Licence Conditions and Codes of Practice (together known as its “LCCP”) which attach to the licences of both remote and non-remote operators. The LCCP includes new provisions in regard to complaints and disputes, anti-money laundering arrangements, the independence from other business operations of the compliance function in each licensee’s business as well as the protection of customer funds.

In addition to changes requiring remote operators to display their licenced status and certain conditions specific to poker and other networks and payment processors, there is an important change requiring all UK licensed operators (obviously greatly extended in number as a consequence of the 2014 Act) to obtain their gambling software only from a holder of a British gambling software operating licence. This important change has led to much discussion regarding the definition of “gambling software.” It was originally defined in the 2005 Act as “computer software for use in connection with remote gambling” although it specifically does not include anything for use solely in connection with a gaming machine. This statutory definition is extremely broad, and the Gambling Commission has long since indicated that in their view the definition should not cover software used by non-gambling businesses as well as by gambling businesses, such as general infrastructure or business application software (general Microsoft, or Apple applications for example). But because of the changes introduced in the newly amended LCCP and on-going issues regarding the definition, in June 2014 the Commission issued specific advice in which it said that it considers any software designed for use in connection with remote gambling and that is intended to be used, or is used, by a gambling operator in the provision of its facilities



for gambling, to be within the definition. This includes gambling specific applications such as software used in virtual event webpages, virtual event control, bet capture/matching, settlement, random number generation and the maintenance of gambling records which show detailed results of games. The Gambling Commission has also issued detailed guidance on those entities in the supply chain for the production of such gambling related software. The Gambling Commission accepts that in many cases many organisations and individuals may be involved in the software production, some perhaps peripherally, in creating the final “gambling software product” which is used in the operation of a remote gaming site.

One of the new initiatives which the Gambling Commission has now introduced has led to much comment worldwide. As part of its updated remote licence application process, the Commission requires details of the jurisdictions from which the licensee derives revenue, including explanations as to the basis on which a licensee operates in a so-called “grey” market. Specifically the Commission requires B2C applicants to identify markets which make up at least 3% of revenues with an explanation for each jurisdiction as to why the applicant thinks it is not acting unlawfully. And if a licensee has no licence in the relevant jurisdiction, the British Commission wants to be told the legal rationale for

transacting with players there, and if legal advice has been taken, the name of the law firm which gave it. Added to this, the Commission has to be informed of other jurisdictions which a licensee is actively targeting with confirmation that a B2C applicant does not knowingly take business from any jurisdiction in which it is either illegal for the player to play or for the operator to provide services. Similar issues arise for B2B operators with regard to their commercial risk of exposure to “grey markets;” put broadly, the Commission requires disclosure of where a B2B licensee obtains its revenues. Not surprisingly these provisions have generated a degree of uncertainty, but the Commission can be expected to take a dim view if an operator undertakes business in regulated markets without the necessary licence. The Commission has said that it will not publish a list of jurisdictions in which its licensees must cease to trade but expects them to undertake their own due diligence and put controls in place to ensure that they meet legal requirements around the world.

Arrangements for the taxation of the revenue from British players which is received by licensees operating under the new regime have been brought into place separately from the 2014 Act. The necessary fiscal legislation is now in place with the consequence that, from 1st December 2014, remote gambling operators doing business with players resident in Great Britain will be required to pay British “gross profit tax” on their earnings from British players at a rate of 15%.

Although it is expected that by the end of 2014 the UK will have completed the implementation of its second attempt at the regulation and taxation of remote gambling, the Gibraltar Betting & Gaming Association announced in June that it had indicated to both the UK Government and the British Gambling Commission its intention to apply to the courts for a judicial review of the changes introduced by the 2014 Act. ♣

² The European Economic Area (“EEA”) comprises the Member States within the European Union (“EU”) plus Iceland, Liechtenstein and Norway.