
Memery Bank

Serious Developments Are Afoot in British iGaming Regulation

Peter Wilson discusses the statement on Remote Gambling made by the Minister for Sport and the potential consequences for offshore gambling operators.

The Minister for Sport, Gerry Sutcliffe, issued an eagerly awaited statement on Remote Gambling today (7 January 2010). He announced proposals to change the existing system of remote gambling regulation in Britain so that *“all operators who want to target British consumers must be licensed by the Commission.”*

His department, the DCMS, will be consulting on the legal changes so we will not know the detail of the proposals until the consultation paper is published. However, the indications given in the statement are that this development will have a fundamental impact on the structure and marketing of the hundreds of online gambling sites that are not currently licensed here but rely on Britain as a key market.

The statement explains that, *“under an extended remote gambling licensing system, all operators active in the British market would have to adhere to the [Gambling] Act’s provisions, its secondary legislation and the Commission’s standards and requirements.”*

Why now you may ask? The Government knew long before the implementation of the Gambling Act on 1 September 2007 that it was highly unlikely that many offshore operators would rush to become licensed in Britain and pay remote gambling tax at 15% and corporation tax at around 30%.

Then in March 2008, the Commission published an advice note on what constitutes Remote Gambling Equipment. (There is a legal requirement to obtain a remote operating licence if you have at least one piece of such equipment used in the provision of gambling facilities situated in Britain.) The advice note contained a surprisingly narrow view of what the Commission considered to be Remote Gambling Equipment, so this gave considerable flexibility for skins and white-labels to operate with servers in Britain and without having to obtain a licence here, provided certain key software such as the RNG and/or the real time transaction monitoring was offshore. They could locate customer registration, marketing and banking in Britain but pay tax at low rates offshore.

Originally, the British government noted that, in order to meet its obligations under the EU Treaty, it had to recognise the right of gambling operators in other Member States to offer their services across borders (Article 49) and to recognise their right of establishment in other Member States



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(Article 43). Therefore, it did not prohibit anyone located in a European Economic Area country from advertising gambling in Britain. Gibraltar was also exempted from the prohibition on advertising of foreign gambling, as it was also in the EEA. Following lobbying by some non-EEA jurisdictions that had their own rigorous licensing regimes, the Government constructed a white list of territories that would be deemed as EEA for advertising purposes if they met regulatory standards that mirrored British legislation. Hence operators in Alderney and the Isle of Man and (subsequently) Tasmania and Antigua are allowed to advertise here.

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But why is the British Government doing something about it only now? What has changed? Several factors come into play. First, there has been a string of ECJ cases which, whilst criticising the anti-competitive practices of a number of Member States, have at the same time clearly established that a restrictive gambling regime does not in itself breach the EU Treaty provided it complies with the principles of EU law. Secondly, gambling is excluded from the Services Directive as well as the E-Commerce Directive. Thirdly, the numerous infringement proceedings commenced by the European Commission have resulted in the subject Member States either partially liberalising by introducing their own restrictive local licensing schemes or, alternatively, strengthening their monopolies to make them seemingly compliant with the EU Treaty, or doing nothing. Fourthly, the Bwin/La Liga case gave encouragement to the monopolies that they could get the formula right to secure ECJ approval.

Meanwhile, it seemed that Britain was the only country fully embracing the EU Treaty principles (apart from our National Lottery monopoly, of course) and, as the Gambling Commission moves into a monitoring and enforcement phase of its life, it would have become increasingly apparent that there was an inability to exercise regulatory control over the majority of sites on which British consumers played.

So much for the reasons behind the proposed change in law and policy, but what can the Government do? The statement does not give much away except to say that, *“these proposals would require legislative changes to implement and there remain many complex issues to be considered; for example, how we can actively police an extended licensing system and keep burdens on industry to a minimum.”*

There is also the question of taxation of offshore operators, and Mr Sutcliffe has conveniently side stepped that for the time being by saying it is a question for the Treasury. However, he has said that the DCMS is continuing to explore ways to apply the Horserace Betting Levy to overseas operators, *“with the intention of ensuring that all operators taking bets on British races pay to support British racing.”*

As it seems that those offshore operators who *“target”* British consumers or who are *“active”* in the British market will have to become licensed here (and thus pay the Levy anyway if they take bets on British horseracing),



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this may mean that the Government is planning to prohibit anyone else (i.e. not required to be licensed) from taking bets on British racing unless they pay the Levy. Presumably, this means offshore sites who target foreign consumers who like British racing? This proposal clearly needs working through.

What do the proposed changes mean for all those operators licensed in the white listed territories? Mr Sutcliffe explains, *“The new system outlined today will also ensure that all businesses offering online gambling to our consumers adhere to our rules – not someone else’s.”*

But, in a way, the white list territories did adhere to British rules as, after all, they had to satisfy the DCMS that they met the long list of white list criteria before their operators were allowed to advertise in Britain.

There is not much comfort to be obtained from the DCMS press release when it says, *“The Government is considering what the plans mean for operators based in countries outside Europe – specifically in terms of the Government’s approved ‘whitelist’ of countries whose operators are able to advertise in the UK. The Government intends to keep the ‘whitelist’ in some form and it will remain a fundamental part of any future regulatory system. Proposals for any changes to the system will be included in the consultation.”*

If the Government reneges on previous commitments it could face legal challenges, although, it seems hard to believe that the DCMS would have published its statement today without having had at least some previous discussions with the white listed territories about forthcoming changes.

So we shall wait and see what is really proposed when the details are set out in the consultation paper. One of the easiest routes available to the DCMS is a broadening of the interpretation of what is Remote Gambling Equipment, as that would not necessarily involve any new legislation. However, this may not be enough to achieve the objectives outlined above, and we are likely to see some additional regulations as well under the Act. Primary legislation (i.e. a new Act of Parliament) is not a particularly realistic objective bearing in mind the Government’s other pressing priorities as the country remains stuck in recession and with an election in a few months. Whatever happens, this consultation paper will come under more scrutiny and attract more attention than most.



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About the Author

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