

REMOTE BETTING OPERATORS: WHY STAY ONSHORE?

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1. Assume you run a current remote bookmaking business based in the UK, holding a GC operating licence and you are considering whether to stay in the UK or to operate from offshore.

2. Reasons for leaving:
 - Tax – corporation (usually hand in hand with regulation)
 - GBD: s. 2(1) BGDA 1981: 15% of net stake receipts charged on “a bet made with a bookmaker who is in the UK”.
 - Levy: s. 27(2)(a) BGLA 1963 “payable only by a bookmaker who carries on....a business which includes the effecting of betting transactions on horse races”
 - Regulation (?)

3. Constraints on leaving:
 - 3.1 Staff
 - 3.2 Costs of moving/exit taxes
 - 3.3 Public perception
 - 3.4 Infrastructure in offshore location
 - 3.5 Advertising: s. 331 GA 2005

331 Foreign gambling

- 1) A person commits an offence if he advertises foreign gambling other than a lottery.
- 2) In this section ‘foreign gambling’ means –
 - a) non-remote gambling which is to take place in non-EEA

- b) State, and remote gambling none of the arrangements for which are subject to the law about gambling of an EEA State (whether by being regulated, exempted, prohibited or otherwise).
- 3) Subsection (2) shall apply to Gibraltar as it applies to EEA States.
- 4) The Secretary of State may by regulations provide that a specified country or place is to be treated for the purposes of subsection (2) as if it were an EEA State.

The Gambling Commission is obviously devoting specific resources to monitoring advertising; in 2009 it has published two documents which evidence this. See its Information Note, July 2009 “Online mystery shopping programme” and its Advice Note, September 2009 “Sponsorship of British sporting clubs by foreign gambling operators.”

3.6 s. 36 GA 2005 (which relates back to the penal provisions of s.33)

Territorial application

- (1) *For the purposes of section 33 it is immaterial whether facilities are provided -*
 - a) *wholly or partly by means of remote communication;*
 - b) *subject to subsections (2) and (3), inside the United Kingdom, outside the United Kingdom, or partly inside and partly outside.*
- (2) *Section 33 applies to the provision of facilities for non-remote gambling only if anything done in the course of the provision of the facilities is done in Great Britain.*
- (3) *Section 33 applies to the provision of facilities for remote gambling only if at least one piece of remote gambling equipment used in the provision of the facilities is situated in Great Britain (but whether or not the facilities are provided for use wholly or partly in the United Kingdom).*
- (4) *In this Act “remote gambling equipment “ means, subject to subsection (5), electronic or other equipment used by or on behalf of a person providing facilities for remote gambling –*
 - a) *to store information relating to a person’s participation in the gambling,*

- b) *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,*
- c) *to determine all or part of a result or of the effect of a result, or*
- d) *to store information relating to a result.*

(5) *In this Act “remote gambling equipment” does not include equipment which -*

- a) *is used by a person to take advantage of remote gambling facilities provided by another person, and*
- b) *is not provided by that other person.*

3.6.1. Before discussing s.36 in detail, an overview of it may be helpful. It is submitted that it is quite clear from this section that the Act has approached the difficult question of where remote gambling takes place by stating it to be where the operator, not the player, is based and in determining where that is it has deemed, under s. 36(3) it to be the UK if at least one piece of “remote gambling equipment “used in the provision of the facilities is situated in Great Britain. Accordingly if, under s. 36, an operator is not deemed to be based in UK then he has no need to have a licence. This remains the case even if any or all his customers are themselves based in GB. Conversely, he will require a licence if he is deemed to be based in the UK even if no UK based player can access the site and, it follows, all players are based outside the UK. This approach does not happily fit with the claim set out in the DCMS’ Policy Document for the Gambling Bill that British citizens should be protected from gambling with unregulated operators.¹ Consideration of s. 36 in more detail is however necessary; its provisions are Byzantine and not at all easy to understand.

3.6.2. s.36(1) states that in the case of remote communication it is immaterial to liability under s. 33 whether the facilities for gambling are provided

- a) inside the UK
- b) outside the UK
- c) partly inside/outside the UK

however (a)-(c) are specifically subject to s. 36(2) and (3).

When s. 36(1) speaks of the place where facilities for gambling are provided there are two possible meanings. Are we concerned here with the place from which provision occurs or with the place to which provision is made i.e. does s. 36(1) make a statement about the location of the provider or the

¹ See Draft Gambling Bill, The Policy, DCMS, November 2003, paragraph 4.61.

customer? It is submitted that the former meaning is to be preferred as it is more consistent than the alternative with

(i) s. 36(2) which is clearly concerned with the place from which facilities are provided .

(ii) s. 36(3) which in its primary phase focuses on location of the equipment used to provide gambling facilities and which, in addition, by the phrase “for use” in the bracketed words highlights the distinction between the location of the provider and that of the recipient .

(iii) the words used in Explanatory Note 139 viz “where gambling takes place remotely, the person providing the facilities for gambling will not fall within the scope of the offence if he does not have relevant equipment within Great Britain”.

(iv) regulation of the commercial entity (the provider) rather than the recipient who in most cases will be a mere private punter.

3.6.3. Accordingly it can be concluded that under s. 36(1) it is immaterial to s. 33 liability if the party providing the gambling facilities is himself outside the UK – say in Gibraltar, subject to any limitation placed on that wide jurisdictional claim in s. 36(2) or (3). S. 36(1) itself however makes no statement about the location of the recipient of the services.

3.6.4. It is apparent from s. 36(2) and (3) that each circumscribes the width of 36(1). Under s. 36(2) if provision of non-remote facilities is being made by a company based in Gibraltar it will only be liable under s. 33 if in fact it does something in the provision of the facilities in Great Britain.

3.6.5. s. 36(3) circumscribes the ambit of s. 36(1) in that it informs the Gibraltar operator that it will only be liable under s. 33 if at least one piece of remote gambling equipment which is used in the provision of the facilities is situated in Great Britain. Before going on to discuss the application of the definition of remote gambling equipment which is to be found in s. 36(4) we need however to examine two phrases found in s. 36(3). The first is the meaning of “used in the provision of the [gambling] facilities”; the second are the words in brackets at the end of s. 36(3).

3.6.6. Turning to the words in s. 36(3) (which are, in effect, replicated in s. 36(4)) it is necessary to analyse when equipment is “used” in the provision of “gambling facilities”. It seems that if equipment is used, in the terms of s.36(4)(a), to store information relating to a person’s participation in the gambling that is not sufficient unless that storage is a necessary part of the provision of the facilities. It is submitted that the requirement that use of equipment is related to the provision of gambling facilities produces the result that not all equipment used by a remote gambling operator, even if it has the requisite storage elements, is caught by s.36. If the equipment’s use is incidental to the provision of the facilities it is surely arguable that it falls outside that section.

3.6.7. This topic has been helpfully discussed in some detail in the Gambling Commission’s Advice Note “Remote Gambling Equipment” the second edition of which was published in March 2008. As the views of the Commission on the point are relatively new (they did not appear in the first edition of the Note, dated January 2007) and are likely to be highly persuasive it is worth setting them out verbatim below.

3.6.8. At paragraphs 4.3-5.2 it is stated;

“We read “used in the provision of facilities for gambling” as relatively narrow and as not extending to all equipment used by a remote gambling operator generally in connection with, or incidentally to, the provision of gambling. Thus, for example, - and based on our present understanding of such systems in use in the remote gambling industry – we do not consider equipment used for integrity testing, money laundering compliance and monitoring, complaints handling and responsible gambling analysis to be “used in” the provision of the gambling activity because they are not used by the customer or operator as part of that gambling. Below are further specific examples.

Operators typically keep some data about customers and their previous gambling activities for the purposes of marketing, including offering bonuses and other incentives related to the amount that a customer has gambled with the operator. This data may be stored separately from similar data stored in other parts of the operator’s infrastructure.

In the case of equipment which stores information relating to customers’ participation in the gambling and which is used for bonus and reward calculations, we consider only the core system whose principal function is to offer, operate and settle the gamble to be “used in” the provision of facilities for gambling. Therefore, whilst we would consider systems used to calculate bonuses or

other rewards or incentives which are awarded or determined during the course of a single gambling transaction or session of “play” (whether the activity is betting, gaming or participating in a lottery) to be remote gambling equipment, we would not necessarily take the same view of systems that only operate to calculate rewards and incentives based on a customer’s historic play. The latter we would normally regard as an aspect of marketing and not as tantamount to a prize related to specific gambling.”

3.6.9. The Note goes on to discuss client application download servers in the context of s. 36 as well as business continuity arrangements. In respect of the former it states in paragraph s. 6.1-6.5:

“Games may be deployed using a “client application”, that is, a piece of software that is downloaded by and installed on the end-user’s device to present a rich graphical and auditory interface that represents the game.

....In the context of download servers, the Commission would not normally consider equipment that is used as described above as being used in the provision of facilities for gambling, as long as that equipment is only being used as a means of distributing, updating and checking applications to be installed on the end-user’s device and is not involved once the gambling commences. To meet this distinction the same equipment must not be used to determine the results of virtual events, pass on the contents of gambles from the client application to the server, not pass results from the server to the client.

For example, an offshore operator may choose to place a server in Great Britain that is used for downloading game applications but once the client application has been installed and the gaming has commenced the equipment is no longer involved. In that case the operator would not require a licence.

If, however, an operator located a download server in Great Britain that was also used during gaming to exchange information about the content of the customer’s gamble and the results of the virtual event, this equipment would, under our interpretation, be used in the provision of facilities for gambling. We would consider such equipment as being used “to present, to persons who are participating or may participate in the gambling, a virtual game, a virtual race or other virtual event

or process by reference to which the gambling is conducted” (s. 36(4)(b)). Therefore, in this example the operator would have to hold a remote casino licence.”

3.6.10. In respect of business continuity arrangements i.e. those which are intended to reduce the likelihood of operational downtime, prevent data loss etc, it makes a number of subtle distinctions. At paragraphs 7.2-7.6 it states:

“...In considering whether such systems are remote gambling equipment, the Commission draws a distinction between equipment used to store a backup of operational data for a gambling system and equipment that is used as a standby or disaster recovery system.

The Commission defines standby and disaster recovery equipment as equipment that the operator intends to use in, or as a replacement for, the ‘live’ system in the event that the equipment normally used is unavailable. Standby and disaster recovery equipment is, therefore, intended to be used in the provision of facilities for gambling and any such equipment used to deploy the components identified in Table 2 would be remote gambling equipment, which if sited in Great Britain would require the operator to hold a form of remote gambling licence.

For example, if an operator’s primary gaming system is located outside of (sic) Great Britain, but they choose to have a disaster recovery facility in Great Britain, which would become their live gaming system in the event that their primary data centre became unavailable, the operator would require a remote casino licence.

The Commission has also considered whether equipment that stores back-up data for gambling systems is remote gambling equipment. We define equipment used to store back-up data as equipment that holds a copy of operational data but which not in itself be used as part of the ‘live’ gambling system. The data will instead be restored onto ‘live’, standby or disaster recovery equipment. We would not normally consider such equipment to be “used in the provision of facilities for gambling”.

For example, if an operator has a betting system located outside Great Britain but uses equipment in Great Britain to keep a mirror copy of their operational data, this operator will not require a remote betting licence as long as that equipment is only used to enable the data to be restored onto the offshore system and never itself used to provide facilities for gambling”.

3.6.11. The words at the end of s. 36(3) are “but whether or not the facilities are provided for use wholly or partly in the United Kingdom”. It is noteworthy that these words must be concerned, in contrast to those used in s. 36(1), with the location of the recipient – the customer. This is apparent, it is submitted, from the phrase “for use”. Can the bracketed words at the end of s. 36(3) mean that if a Gibraltar operator provides facilities solely to non-UK based customers that is sufficient to conclude that s. 36(3) could not apply to its operations? It is submitted that the words in brackets, whilst ambiguous, cannot support that reasoning. The matter can be resolved as a simple matter of construction. Applying the positive (“whether”) to the categories set out at the end of s. 36(3) produces the result that liability arises only if the facilities are provided wholly or partly for use in the UK. However, when the negative (“or not”) is taken into account this causes liability to arise if the facilities are provided not wholly for use in the UK or, crucially, not partly for use in the UK. This latter meaning causes liability to arise even if the facilities are provided for use, in our example, wholly outside the UK. Moreover, such an approach is supported by the words used in the DCMS document “The Policy” dated November 2003 and which concerned the Draft Gambling Bill. At paragraph 4.67 of that document, having stated that the Government’s judgement is that the better view is that the gambling takes place wherever the gambling operator is based it continues,

“The draft Bill therefore requires all remote gambling services located in Great Britain to seek a licence for their activities, regardless of whether their services are designed for British citizens” (emphasis added).

It seems that the emphasized words provide a readily understandable gloss on the bracketed words which now appear in s. 36(3).

Indeed it is submitted that this approach is consistent with the policy of s. 36(3) and (4) which is not to regulate gambling operations which are wholly offshore but to regulate any provider of gambling facilities who has any key equipment onshore irrespective of where his customers are located.

3.6.12 s. 36(4) defines remote gambling equipment; it is any equipment used by or on behalf of a person providing facilities for remote gambling to do any of the matters set out at (a)-(d). When attempting to understand the precise ramifications of (a)-(d) it is not only necessary to consult the

relevant Explanatory Notes (see below) but also the Advice Note of March 2008, as described in paragraph 18 above. What is particularly noteworthy from paragraph 8 onwards of it is that equipment which has a non-production function is not considered to fall within s. 36. Accordingly, a data warehouse is not within its ambit but settling functions and gambling transactions clearly are.

3.6.13 Under s. 36(4)(a) the first function of 'remote gambling equipment' is that the relevant piece of equipment stores information relating to a person's participation in the gambling. Explanatory Note 141 states that it includes the "game history" of a player including the player's identity and records of their wins and losses. Equipment used for storage of information for general purposes would not be caught by the definition, unless the information relates to someone's participation in gambling.

3.6.14 s.36(4)(b) captures equipment used for generating and presenting virtual gambling.

3.6.15 s.36(4)(c) is concerned with a relevant piece of equipment which determines all or part of a result or the effect of a result. Explanatory Note 140 states that this covers random number generators used in virtual gaming, or the equipment for calculating whether someone has won or lost a bet on a real event.

3.6.16 s.36(4)(d) is engaged if the relevant piece of equipment stores information in relation to a result. Explanatory Note 140 also states: "This is different to equipment under subsection 4(c) which covers the act of generation of a result not its subsequent retention."

3.6.17 Accordingly, piecing together the relevant parts of s. 36(3) and (4) in the context of the Gibraltar operator and, say, the provisions of s. 36(4)(a) the following questions emerge:

- 1) Is the operator providing facilities for gambling to a customer - P?
- 2) Is equipment situated in GB used by the operator or on its behalf to store information?
- 3) Does that information relate to P's participation in the gambling?
- 4) If so, is that equipment used by the operator in the provision of facilities for remote gambling to P?

If all questions are answered affirmatively then s. 33 applies; if any one is answered negatively then it does not.

s. 36(5)

3.6.18 This specifically excludes from remote gambling equipment an item even if it, for example, stores information within s. 36(4)(a) or otherwise prima facie fall within s. 36(4) is used to access gambling facilities made available by another so long as he has not provided the item. In simple terms a PC. used by a player at home to participate in remote gambling is not a relevant piece of equipment unless the operator has provided it. If he has then, so long as s. 36(4) is otherwise fulfilled the operator will need to be licensed. If he has not, he can operate without a licence. No doubt an operator who might be concerned by s. 36(5)(b) will ensure that another legal entity will provide the P.C. to the favoured player.

4. The outcome for many operators will be obvious:
 - Choose a venue from which advertising into UK is permitted
 - Ensure infrastructure exists there
 - Sort out staff issues
 - Don't fall foul of s. 36.

5. Could the law change in the near future?

5.1 Will the law remain as it is? Politics could lead to massive changes with the object either of forcing those offshore to locate/relocate to the UK or, ignoring the place from which an operator provides gambling services, by levying a place of consumption tax on operators wherever they are located i.e. by causing the tax to apply to the activities of UK punters.

5.2 There is no doubt that the possibility of change is in the air. Currently DCMS is carrying out a review which could result in radical change and there are European moves which are protectionist in nature. In particular see the current situation in France, Italy and even Germany (which has implemented the Interstate Gambling Treaty) and the ECJ has recently ruled in the Liga Portuguesa case that Member States are not precluded from restricting remote operators established in other member states from operating and advertising in that member state on grounds of protecting consumers against potential fraud and crime.

5.3 The possibility of introducing a P.O.C. tax in this field is not beyond possibility; in the UK we currently have two such taxes; VAT and Insurance Premium Tax.

Conclusions

6. Until very recently the decision to locate or relocate offshore seemed, from a purely commercial point of view, to be an obvious course to take. That position is not so clear now. Indeed those who have relocated business offshore may have made a costly mistake although it could be that even a short (2-3 year?) respite from the current UK tax, duty and Levy imposts may be sufficient to have made the move worthwhile.

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