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Getting shirty: is it illegal for unlicensed remote gambling operators to sponsor UK teams or not?

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Getting shirty: is it illegal for unlicensed remote gambling operators to sponsor UK teams or not?

The background to a speech given by David Clifton at SBC Events' Betting on Football Conference held at the Emirates Stadium on 10 September 2015

Some of you may have been present at Stamford Bridge in May last year when I spoke at the first Betting on Football conference on the subject of *"Laws of the game: how will the new licensing laws affect sponsorship?"*

The subject-matter of my talk was whether the then forthcoming change to the British remote gambling licensing and regulatory regime would curb the seemingly ever growing upward curve for sponsorship deals between the UK's leading football clubs on the one hand and gambling operators on the other.

It was a very topical issue with industry media headlines at the time warning the industry:

- **"UK Gambling Bill to … cause advertising headache"** – SBC News
- **"UK Gambling Bill will have major impact on advertising"** and **"New UK advertising guidelines will mean significant source of income will disappear"–** iGaming Business
- **"Asian Bookies Rethink Premier League Sponsorships"** and **"Full Time Nears For English Football's Asian Invasion"** – Gambling Compliance

No surprise that it was causing concern, given that:

- the definition of advertising in the Gambling Act 2005 is very broad and includes sponsorship arrangements, market branding and direct marketing,
- gambling companies spent about £690 million on marketing in the UK in 2013,
- the gambling sector had been one of the fastest rising sponsors of sports organisations in recent years – with a 350% growth in worldwide reported deals between 2007 and 2011, but
- the change in the law was designed to prevent all remote gambling operators who were not licensed in Great Britain from advertising here.

The Gambling Commission had expressly ruled out any possibility of an "advertising only" licence, ie permitting operators to advertise to overseas markets by means of shirt sponsorship or perimeter advertising but not allowing them to transact with British customers.

I went out on a limb and expressed the view that it was strongly arguable that an unlicensed operator would not commit the offence of advertising unlawful gambling if it blocked access by British consumers to its gambling website and made this clear to consumers. What was then the Bill before Parliament, but is now the Gambling (Licensing and Advertising) Act 2014, does not expressly

require a prospective advertiser to obtain a licence. Instead it requires an operator to get a licence if its gambling facilities are used in Great Britain (even if no equipment is located here) and the operator knows, or should know, that the facilities are being used or are likely to be used in Great Britain.

So now – 16 months on – the following question is posed to me at this conference: *"is it illegal for unlicensed remote gambling operators to sponsor UK teams or not?"* You might think that, more than 10 months since the law changed, the answer would be a straightforward "yes" or "no". Would that it were so simple.

It still remains the case that the Gambling Commission will not grant an "advertising only" licence. In May last year, they had already gone on record stating: *"The Commission will not normally license .... operators unless they have a British facing business and either currently transact with British consumers or have a clear business plan for doing so in the future".*

You might have thought that then Commission would take the opportunity also to provide a clear answer to the question that is posed today. But no, instead they adopted their usual position saying that: *"only the courts can provide a definitive view on the legal position".*

In case you were wondering, as yet the courts have had no case come before them in which they have had to decide this question.

Perhaps the Commission has no appetite for a fight, bearing in mind that, with specific reference to the argument that I put forward at this conference last May, it has stated publicly that: *"the Commission considers that the position on non-remote advertising is arguable both in terms of the law and the facts of any particular case"* – whatever that means.

Perhaps there has not yet been an instance of flagrant breach of the law that has caused the Commission to take action through the courts system. In January Jenny Williams said that the Commission had only become aware of eight instances of advertising of illegal advertising of unlicensed sites some of which had desisted immediately on request and the remainder were *"being dealt with".* That is not to say that it won't take action in the future though. Its website says:

> *"Specifically the non-remote advertising of remote gambling by means of, for example, sponsorships risks committing the advertising offence of advertising unlawful (ie unlicensed) gambling - unless it makes it clear both in the product as advertised and in reality that that type of gambling activity is not available to those in Britain. In addition those accepting sponsorship risk assisting unlicensed operators provide gambling facilities illegally to those in Britain".*

You might think that it is those words in red that provide a get-out. I'll come back to that, and specifically the question of blocking, in a moment.

In the meantime, where exactly does the risk lie? The answer was set out in a letter that Nick Tofiluk, Director of Regulatory Operations at the Gambling Commission sent to Sports Governing Bodies on 27 October 2014. He said that there were two risks:

1. the risk of committing offences by virtue of an unlicensed third party sponsor failing to prevent consumers based in Great Britain from accessing its services
2. the impact on the overall effort to combat match-fixing through corrupt betting of promoting unlicensed operators in foreign markets.

He went on to warn that:

- organisations engaging in sponsorship arrangements (ie the clubs, or the equivalent, themselves) may be liable under section 330 of the 2005 Act for the offence of unlawful advertising if they do not ensure the remote gambling activity is actually blocked to consumers in Great Britain and that this is clear to consumers, and
- a sports club or body will be liable for the section 330 offence if it provides a link to an unlicensed sponsor on its website whose facilities for gambling are not blocked to British consumers.

So, what became abundantly clear was that unlicensed operators looking to advertise here must have an effective blocking mechanism in place. Some regarded this as an adjustment of thinking on the Commission's part, but the Commission soon stamped out such thoughts, announcing on 7 November that:

- the letter *"did not represent any change of position"* on its part and
- it continued *"to point to the twin risks that those advertising in Britain run, ie the risk of committing the advertising offence – if the gambling as advertised would or might need a licence to be lawful – and the risk of being associated with those transacting illegally with those in Britain".*

The problem here is that the Gambling Commission has grave doubts about the effectiveness of blocking. It warns on its website that:

- *"blocking technology is not 100% reliable"* and
- *"it is possible for consumers to circumvent blocking measures"*

concluding that:

- *"sports clubs carrying advertising from unlicensed operators (and taking the alternative arguable position that blocking access to British consumers is sufficient) will be wholly reliant on that operator having appropriate and effective measures in place to block access to British consumers if they are to avoid committing an offence of unlawful advertising".*

It also has deep-rooted policy reasons that have led it to adopt a stance that many believe goes beyond what is actually provided for within the legislation. Nick Tofiluk said as much in his letter of 27 October: *"To put it bluntly, the promotion of unlicensed betting operators by sporting organisations is likely to send messages that are counter-productive"* and *"the best way for sports bodies to protect themselves against this risk is to ensure that they only promote gambling operators that hold operating licences issued by the Gambling Commission".*

Indeed the Commission has confirmed as much on its website, making clear that it has *"policy and operational reasons for its opposition to non-remote advertising (for example, shirt sponsorship) of unlicensed remote gambling".*

It lists these reasons as follows:

- ensuring that those advertising remote gambling in Britain are all subject to the provisions around reporting suspicious betting activity and the general player protection framework, and
- a general presumption against non-remote advertising of unlicensed gambling provides greater clarity to operators and the carriers of advertising as to who is and is not able to advertise, which it describes as *"important because without such clarity compliance and enforcement of the advertising provisions would be more complex and costly; costs borne by the licensed industry through their fees".*

The bottom line seems to be that:

- unlicensed operators can sponsor UK teams as long as they make it clear both in their advertisements and in reality that that their gambling activity is not available to those in Britain, so that they can argue both that they didn't know, and it couldn't be said that they should have known, that their gambling facilities were likely to be used in Britain

but:

- the Gambling Commission doesn't want them to.

However, the fact is that major sponsors such as Marathonbet and Mansion Group have obtained operating licences. Others have been investigating green screen technologies enabling gambling advertisements to be digitally superimposed on perimeter advertising hoardings and only broadcast in the relevant foreign territory. So it may be that the courts will never be troubled to decide once and for all whether it is illegal for unlicensed operators to sponsor UK teams.

Whilst speaking to you on the subject of advertising, it would be remiss of me not to mention the consequences of the four reviews of the gambling advertising market that have been carried out in accordance with the express request of the Government:

- the Industry Group for Responsible Gambling has introduced a series of enhancements to the Industry Code for Socially Responsible Advertising, including restrictions on the marketing of pre-watershed sign up offers on TV
- the Committees of Advertising Practice (CAP and BCAP) have published their assessment of the regulatory implications of new and emerging evidence for the UK Advertising Codes
- the Advertising Standards Authority has published its review of how the UK Advertising Codes are applied, and
- the Gambling Commission has reviewed its licence conditions and codes of practice (LCCP) and strengthened provisions relating to the marketing of promotional offers, such as free bets and bonuses.

What has most prominently emerged from this is that:

- conditions and factors that are likely to affect a consumer's decision to participate in a gambling transaction (such as free bets and bonuses, restricted odds and deposit, wagering and withdrawal requirements) must appear, with sufficient prominence, in the advertisement itself. The Gambling Commission's advice is: *"if unsure, include it"*, and
- LCCP social responsibility code provision 5.1.7 (Marketing of offers) that requires that marketing material does not amount to or involve misleading actions or misleading omissions, and reinforces the existing rules set out by the Committees of Advertising Practice.

The above rules apply to all forms of marketing communications, including social media and affiliate marketing.

Bear in mind too that the Gambling Advertising Monitoring Unit was re-established in 2013 as a collaborative working forum (comprising DCMS, the Gambling Commission, Ofcom, ASA, CAP & BCAP and PhonepayPlus). It is *"committed to working together to share information and address matters of concern".*

Finally, for those of you who were hoping 16 months ago that the new licensing and regulatory regime – and introduction of its associated point of consumption tax – would disappear in a puff of smoke at the lance of a knight on a white charger (in the form of the Gibraltar Betting & Gaming Association):

- the first judicial review challenge was dismissed in peremptory fashion by the High Court last September, which found that the new licensing regime was *"neither disproportionate nor discriminatory, nor is it irrational"*, but
- a glimmer of hope remains insofar as the tax regime introduced last December is concerned. On 14 July this year Mr Justice Charles decided that the new tax raises issues of European law that should be determined by the European Court of Justice. In theory, if the tax regime (which has been expected to raise £300 million per year) is found to be in breach of European law, HM Revenue & Customs could be ordered to repay all of the tax it has taken so far. What a lot of advertising space that could buy.

Note: This document is not intended to be a comprehensive review of all developments in the law or practice, or to cover all aspects of those referred to. Readers should take legal advice before applying the information contained in this publication to specific issues or transactions. In particular, any unlicensed operator thinking of taking the advertising risks described above in the UK should take specialist legal advice before doing so, as too should any football or other sports club considering a sponsorship agreement with an unlicensed operator.

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