



Gambling

Advertising by remote gaming operators

If you place an advert in Britain for an offshore poker site that says, “**Test your nerve with poker**” or “**Play on-line anytime**” you will have committed a criminal offence and could go to prison for up to 2 years, so says the Gambling Commission and the Department of Culture, Media and Sport (DCMS).

The above examples are included in a **Note on advertising by remote gaming operators** (“the Note”) that pulls no punches. Recently published¹ by the Commission and the Government, it gives their interpretation of the restrictions on advertising gaming (betting is not affected) under section 42(1)(c) of the Gaming Act 1968 (“the 1968 Act”).

It is the start of the crackdown threatened by Tessa Jowell in November last year when the Minister said, *“It’s clear that some adverts have been breaking the existing law. I am not willing to turn a blind eye to this and have agreed with the Gambling Commission that we should crack down on advertisers and publishers who knowingly break the law. We will issue them with new guidance and I am putting them on notice that we won’t hesitate to ask the Crown Prosecution Service to act.”*

Four months later, we have that guidance. Therefore, it is not unexpected but it is a little surprising as the Government and Commission have given a wide interpretation to the law. It will mean a rethink for most of the offshore internet gaming sector that advertises in the UK. A flick through recent copies of two

popular gambling magazines revealed that one of them, had eleven full-page adverts which would be considered illegal according to the Note and the other, had eight such adverts – all from leading gaming operators in the sector. Some specialist gambling magazines have over time adopted a more liberal approach to gaming adverts on the basis that people buying such magazines would expect to read about offers of gaming services and products. There is no such dispensation in the Note and it serves as a final warning. Its purpose is:

“to provide guidance to advertisers, publishers and remote gaming operators on the types of advertisements that the Government and Commission will consider passing to the CPS² on the basis that they are in breach of the 1968 Act.”

Is the Note merely an interpretation of the existing law or more a statement of policy? Probably both, however, the point is that if you have an advertisement (commissioned from or placed in Britain) that is one of the “types” illustrated by the Note then you are at risk of a criminal prosecution.

Before looking at further examples of the types of forbidden advertisements, we

¹ Published on both the Commission and DCMS websites at www.gamblingcommission.gov.uk and www.culture.gov.uk

² Crown Prosecution Service

should remind ourselves what section 42(1)(c) of the 1968 Act says:

“42 (1)...no person shall issue, or cause to be issued, any advertisement...

(c) inviting the public to subscribe any money or money’s worth to be used in gaming whether in Great Britain or elsewhere, or to apply for information about facilities for subscribing money or money’s worth to be so used.”

Two key points to note:

- It is the use of the word “elsewhere” that means adverts for offshore gaming sites are included. What matters is not where the gaming takes place, but where the advert is placed i.e. in Britain or commissioned or arranged from Britain.
- To breach section 42(1) (c) the advert has either:
 - to invite the subscription of money or money’s worth for use in gaming and/or
 - to invite an application for information about facilities for subscribing money or money’s worth for gaming.

If there is no invitation in either case then there is no breach.

The question that the online gaming sector has been grappling with for several years, is what amounts to an invitation to subscribe money or apply for information etc? Now the Government and the Commission have told us that they consider that the following are examples of invitations to subscribe money:

- **“Play poker everyday”**
- **“Play poker here”**
- **“Try your luck in our casino”**
- **“Test your nerve with poker”**

- **“Step up and play our £100,000 thriller”**

- **“Play on-line anytime”**

Interestingly, only one of the above examples includes a reference to money. Bearing in mind that many if not most sites offer play for fun facilities, the Government and the Commission are going further than a strictly literal reading of section 42(1)(c). There is no secret about this and the Note says that they, *“maintain that the concept of “inviting” the public extends to any inducement or enticement or encouragement to act in a certain way. Therefore ... to offer someone a bonus or benefit for taking part in gaming or submitting money for use in gaming is a form of invitation”*.

In this vein they give further examples of prohibited advertising as follows:

- **“We will match your first deposit”**
- **“Join today and get a bonus”**
- **“Referral bonus for every friend you introduce to the party”**
- **“Bonus on every deposit”**
- **“£150 free for all new players”**
- **“Over £500 free in monthly promotions for every player”**
- **“Win and double your money”**
- **“Free entry”**
- **“Guaranteed cash prizes everyday”**
- **“Win big cash prizes”**
- **“Win a trip for two to Las Vegas”**

It is acknowledged in the Note that section 42(1)(c) does not make it illegal for overseas sites to advertise in Britain *“whether in newspapers, magazines, billboards, or on the sides of buses and taxis and on tube trains”*. What it does is

regulate and restrict the content of advertisements. Whilst acknowledging that the law places no restriction on operators advertising purely factual information, the only example given in the Note is an innocuous one of providing the name and address or URL of the gaming operator. The Commission would probably like to see all remote gaming adverts restricted to just that.

Examples of factual statements that the Commission and the Government would consider illegal are those that *“are often used to encourage people to gamble”* which they say include the following:

- • **“Free million pound poker tournament”**
- • **“5 new poker games”**
- • **“Daily jackpots”**
- • **“Million pound guaranteed tournaments every month”**
- • **“Best selection of slots”**
- • **“Top payout £1,000 per spin”**
- • **“Weekly tournaments”**
- • **“Progressive jackpots”**
- • **“Poker games to suit everybody”**
- • **“Up to 100,000 players on-line”**
- • **“More prizes – bigger jackpots”**

The definition of the word *“advertisement”* as used in section 42 of the 1968 Act is very broad and, although the commercial web did not exist in 1968 the Government would apply an *“always speaking”*³ interpretation of the law. The Note therefore covers remote advertising and websites, pop-ups, banners, hyperlinks, text messages and emails; all of which

³ Applying the reasoning in the case of *Victor Chandler International Limited v Customs and Excise* [2000] 2 All England Law Reports at 315 which dealt with advertising offshore betting on a Teletext service.

would be considered as adverts that could breach section 42.

This appears to be a tightening up on the policy on advertising set out in the Guidelines for the Casino Industry (which still appear on the Commission's website). They say⁴,

“A passive web site (being one found by someone deliberately choosing to access the site concerned), whose principal purpose is to provide information about gaming, including individual casinos, will not be taken as constituting advertising for the purpose of section 42 ...”

Now, if the contents of that website are arranged by or, connected with, someone in Britain, it seems that an invitation to subscribe money for gaming will breach section 42 even if it is on a so called passive website.

The Government do still accept that the offence under section 42(1)(c) can only apply to a person who issued or caused to be issued a prohibited advert whilst in Great Britain. This means that if a website advertisement is published abroad and any publishers, advertising companies and owners or marketers of advertising space and marketing companies are also abroad then no offence would have been committed in Britain. However, the Note warns that if an instruction to issue a prohibited advert is linked back to a person in Britain, then that person, having caused the advert to be issued, may be liable for prosecution.

Many offshore gaming operators have some infrastructure in the UK, including in some cases the marketing department, and they will have to tread much more carefully now when they commission advertising for their offshore sites.

⁴ At paragraph 4 of guideline 6, revised December 2004.

This jurisdictional point is a basic principle of English criminal law procedure as the crimes punished by the English authorities are, broadly speaking, only those committed within our shores. Another equally, if not more important principle of criminal law procedure, is that in deciding whether to prosecute, the CPS has to apply the two stage test under the Code for Crown Prosecutors – the evidential and public interest stages.

The Government and/or the Commission may not have an easy job in seeing that alleged offenders are prosecuted under section 42. First, the CPS will have to be satisfied that the wording used in any adverts (issued or commissioned etc in Britain) is such that there is enough evidence *"to provide a realistic prospect of conviction"*. If so, the CPS will then have to decide that a prosecution is in the public interest.

It seems likely that the Government will focus on blatant and/or repeat offenders. This would be consistent with its historic approach with those who commit misdemeanors in gambling law and sensible; in view of the Commission's objective (albeit in relation to the 2005 Act) of aiming to regulate with a light touch.

Will operators take the risk of a criminal prosecution? Defending one is costly, time consuming and bad PR even if the prosecution is defeated. It is also unlikely that any legal principle could be established as any prosecution will focus on the words used in a particular advert or campaign. In any event, by the time any case reached a senior level Court (on appeal for example) the law would be just about to change or have changed. The old regime under section 42 will be swept away and replaced by a more rational scheme under the 2005 Act (due to be fully implemented in September 2007).

The new rules on advertising will probably apply across all gambling sectors⁵ thereby removing the current distinct advantages for bingo, betting and other types of gambling that can be advertised with fewer or no restrictions.

Undoubtedly, there is a lot at stake here with offshore operators spending huge sums of money on advertising in the British market, yet according to the interpretation of the law in the Note, many of the advertising campaigns currently running will be illegal. If those operators have associated land based businesses in Britain or intend to apply for Remote Gaming Operating Licences under the 2005 Act, they may not wish to pick a fight with the Commission over advertising - whatever their legal advice. Having said that, the Note is unlikely to reduce the amount of gaming advertising in Britain but it will probably force a reassessment of its content.

Want more information?

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