David Zeffman, partner specialising in Gambling at Olswang, examines the legal implications of the Government's intention to compel offshore operators targeting the UK to obtain a licence from the Gambling Commission

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When John Penrose announced that offshore betting operators targeting the UK would, in future, have to obtain a licence from the Gambling Commission, it was clear that the rationale for the decision was to ensure that British consumers receive the same level of protection irrespective of where a gambling operator is based. However, in last year's DCMS consultation the accompanying Impact Assessment stated that 'no specific public protection issues have yet arisen'.

The suspicion that requiring offshore operators to be licensed in the UK was much more motivated by a desire to tax those operators was confirmed by a Treasury announcement a few days later that they will be reviewing the case for changing the betting tax regime in line with the new regulatory structure. The likelihood is, therefore, that betting tax will, like VAT on supplies of online services, end up being charged on a 'place of consumption' basis with operators paying UK tax on bets placed by UK punters, French tax on bets placed by French punters, etc. So, when all these changes (which require primary legislation) have been introduced, will we have the longed for level playing field?

In my view, there are a number of obstacles to this being achieved:

(1) Will it be enforceable?
In last year's consultation, DCMS considered whether to introduce either ISP blocking or financial transaction blocking to deal with unlicensed offshore sites which continue to target the UK. In both cases, DCMS concluded that this would 'not be appropriate in a British context'. They also ruled out the new law having extra-territorial application concluding 'we consider that legitimate operators would not want to risk committing an offence in Britain and that this would therefore provide a suitable incentive to "buy-in" to the licensing system'. However, it is not the legitimate operators that would be the concern but rather companies based far outside the EEA who would have the opportunity to undercut the legitimate operators paying UK betting duty. Indeed, when betting duty was changed to a 'gross profit' basis in 2001, the Government had also looked at a 'place of consumption' tax but concluded that it would be unworkable.

Their report stated 'while a number of the respondents recognised the merits of this proposal all agreed that it would be open to abuse with Customs unable to exercise any control over non-compliant overseas bookmakers. Given the pace of development of communications technology this option is felt to be impractical and inappropriate'.

(2) It's not just betting duty:
It's true that charging onshore and offshore operators the same rate of betting duty on UK punters' bets will be a positive step to equalising the competitive landscape but it's not just betting tax which is lower in Gibraltar, Alderney, Malta and the Isle of Man, it's all the other taxes, the cost of employment and infrastructure costs.

(3) It's not just betting:
Before the 2005 Act came into force, online gaming (as opposed to betting), couldn't be carried out from the UK so the online gaming companies have never been onshore. However, they operate a different business model and paying 15 per cent of their gross profit would have a far greater impact on them than on betting businesses. If the Treasury recognised this by applying differential rates, that would produce its own complications in that some operators would try to restructure their products as gaming to come within the lower tax band; and UK land-based gaming operators would be arguing that any lower rate for online gaming should also apply to them and may even use EU State aid rules to say that this would be legally required.

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