

RESPONSE BY THE ADVERTISING ASSOCIATION TO THE DCMS CONSULTATION ON THE PROPOSED “REGULATORY FUTURE OF REMOTE GAMBLING IN GREAT BRITAIN”

18 June 2010

1. About the Advertising Association

1.1 The Advertising Association represents the entirety of the advertising and promotional marketing industries, including advertisers, agencies, media and support services in the UK. In 2009, advertising expenditure was £14.5bn.

1.2 Advertising is crucial to a competitive market in products and services and is vital to the funding of culture and sporting events. We are one of the UK’s most important creative industries, employing nearly 250,000 people, and providing £6.2bn gross added value to the UK economy each year. Further information about the organization is available at: <http://www.adassoc.org.uk/>

2. Gambling advertising currently

2.1 Gambling advertising has been permitted on British television and in other media since 2007, when the new rules in the Advertising (CAP and BCAP) Codes came into force, following the 2005 Gambling Act which lifted gambling advertising restrictions in the UK.

2.2 The advertising rules were put in place following extensive discussions with the gambling and advertising industries as well as dialogue with the new Gambling Commission and the DCMS.

2.3 They allow gambling operators to advertise in British-based media, subject to the advertising rules, as long as they have a Gambling Commission licence or, in the case of remote gambling operators, that they are based in a ‘white listed’ country with similar regulations to the UK’s.

2.4 The ASA’s rigorous scrutiny, and the effective checks and balances that exist, have ensured that gambling operators can advertise legitimately and responsibly, thus bringing benefits in terms of choice to members of the public who wish to gamble, as well as providing new sources of advertising revenue to British media, amounting to £144 million in 2009.

2.5 The Codes have now been in place for almost three years and in that time the gambling industry has also developed its own codes for socially responsible advertising. These include a requirement for advertisements to contain GambleAware website information.

2.6 In 2008, the ASA published a compliance rate survey on gambling advertising and found a 99% compliance rate, underlining the effectiveness of the current system.

2.7 Although there have been some ASA investigations, in general, gambling advertising has not caused public concern or any notable problem. Thus the status quo appears to be working well.

3. The DCMS's proposed changes to gambling advertising

3.1 The DCMS now proposes to extend the Gambling Commission's licensing scheme to foreign 'remote' gambling operators licensed in EEA member states and Gibraltar. This would mean they have to acquire a licence in order to transact with British consumers and/or advertise in the UK. In addition, DCMS wants to retain a streamlined "white list" of countries from which gambling operators can advertise.

3.2 The DCMS argues these changes would improve consumer protection, as well as providing greater clarity and transparency for media owners that want to check the origins and status of a remote gambling operator for compliance purposes. It would also increase the fees of the Gambling Commission and bring new tax revenue into the UK.

3.3 'Foreign' gambling would now be re-defined as gambling that does not take place on a Commission licence. Existing legislation provides for the Gambling Commission to pursue and, if appropriate, prosecute British-based companies – media or event organizers - involved in advertising any foreign gambling.

3.4 DCMS would also plan to amend the advertising definitions in the Gambling Act in Sections 327, 332 and 333, relating to advertising by non-remote and remote means, both of which apply to the provision of gambling facilities by remote communication. This would mean that advertising by remote gambling operations targeting the British market and requiring a licence would now be extended to new areas which are obviously seen by DCMS as loopholes, including:

- Any form of information by whatever means, including by remote communication, that is intended to come to the attention of one or more persons in Britain (including broadcast and other advertising, and any advertising by remote means);
- A communication intended to come to the attention of one or more persons in Britain (this would include spam emails);
- Data made available with a view to it being accessed by one or more persons in Britain (or in circumstances where it is likely to be accessed) (eg including gambling websites in English with co.uk addresses, and the ability to gamble in sterling, or banner ads on non-gambling websites).

3.5 As a liberalization measure, the DCMS is also considering permitting the advertising of non-remote foreign gambling in the UK (eg the advertising of overseas destination casinos) without the need for a licence or express permission by way of inclusion on the white list. This is on the grounds that a consumer would have to travel outside Britain to participate in the gambling being advertised and so would not expect the same level of consumer protection.

4. Advertising Association's view

4.1 Approximately £144m was spent in the UK in 2009 on gambling advertising, including licensed and remote operators¹. This excludes event sponsorship. We are not aware of any serious problems since the ban on gambling advertising was lifted and the new rules appear to have been operating well since they were implemented in 2007.

4.2 As long as advertising revenue is not at risk, and the consumer stands to benefit, the Advertising Association is in favour of measures that provide consistency and transparency so that all gambling operators provide equivalent outcomes regarding fairness, crime prevention and social responsibility. We understand that, in terms of contributions to research, education and 'problem gambling', remote operators would ideally all be equal in making contributions to measures that would be of benefit to the consumer.

4.3 However, without more quantification of the consumer detriment, we are not convinced that maintaining the white list and also extending a Gambling Commission Licence to any remote gambling operator targeting British consumers or seeking to advertise to them is a proportionate means of achieving the above goals.

4.4 If gambling licence holders incur a high UK tax liability, this could make it not viable and certainly not attractive to advertise to British consumers or to fund events through sponsorship.

4.5 Not only that, but it will be in certain cases simply impractical and disproportionate to expect sponsors of big international events to seek a British gambling licence. Does the DCMS really expect, for example, Bwin's sponsorship of Real Madrid to be subject to a British licence if the football matches are broadcast on television channels for British as well as continental viewers? . The AA would like to request DCMS to clarify the practical and financial consequences of the measures it proposes, and to comment on the possibility of loss of advertising and sponsorship revenue should the licensing system be adopted.

4.6 DCMS also makes the case that media owners will benefit by the licensing of remote operators and having these licenses available to view on the Commission website, because media owners will be able to verify the status of any operators prior to carrying their advertisements. We do not believe this is the case.

4.7 Firstly, this situation simply does not apply in the case of non-broadcast media which are not responsible for complying advertising pre-publication: it is the advertiser (the remote gambling operator) that has this responsibility.

4.8 Secondly, contrary to the issues raised in the consultation paper about the current situation creating a lack of clarity for media, our investigations with the AA's broadcast media members have not revealed significant concerns about complying advertising for remote gambling operators.

4.9 Instead, we are concerned that the new measures could unnecessarily increase broadcasters' compliance requirements and costs. Questions are raised as well about

¹ Nielson data 2009

the penalties which may be levied for carrying an advertisement by a non-licensed operator.

4.10 The Advertising Association welcomes the DCMS's liberalising measure to allow non-remote foreign gambling operators (eg casinos) to advertise in the UK without a Gambling Licence or without being included as a white listed jurisdiction. However, this appears to be a very limited benefit, as we understand that this will not result in a large increase in advertising spend, and this "benefit" does not outweigh the "disbenefits" we see in the other changes proposed.

To conclude:

- Whilst on the face of it, DCMS's proposals seem to be in the consumer interest, we are concerned about the possible knock-on impact on advertising revenue and sponsorship of events.
- Gambling advertising has operated well since the restrictions were lifted in the last two years, and the consultation does not point to real consumer detriment with the current situation. The only detriment seems to be to the Gambling Commission's fee structure.
- We are therefore skeptical about the need for any changes, which we think could actually be counter-productive for the advertising industry and for the sponsorship of events, and so we would ask the DCMS to provide more facts and figures to substantiate its case.
- A better approach, to ensure a high level of consumer protection throughout Europe, would be for the Government to support the case for an EU-wide gambling law that sets similar regulatory standards across Europe.

PART 2

RESPONSE TO CONSULTATION QUESTIONS

- 1. Do you agree with the Government's preferred option in relation to EEA and Gibraltar licensed operators? If not, please set out clearly your reasons and let us know if you consider any of the options, or any other option not considered in this paper, to be more appropriate.**

The Government's preferred option is to introduce the need to obtain a licence to transact with British consumers and advertise in the UK, in addition to keeping a streamlined white list. We do not agree with this approach.

Whilst the AA supports the principle of a proper level regulatory protection for consumers, and we would point out that the current white list system does result in equivalent outcomes, even if the regulators do not process procedures in identical ways, as would be the case under a Gambling Licence. We question why DCMS is proposing both to keep the white list and to extend the licensing regime. This seems like double regulatory jeopardy.

The AA also has concerns about the possible implications to advertisers and media owners which we have set out in paragraphs 4.7-4.9 above. We believe

that the tax burden that could be imposed on licence holders, as a result of having a Gambling Commission licence, could deter them from advertising or sponsoring events, and is likely to be ineffective as remote gambling operators could find it easier to ignore and evade the regime, given there are no laws of extradition or effective sanctions that can be applied.

- 2. Do you agree with the Government's preferred option b (a more streamlined white listing process as well as introduce licensing for operators in white listed jurisdictions)? If not, please set out clearly your reasons and let us know if you consider any of the options, or any other option not considered in this paper, to be more appropriate.**

No, we do not agree. This "double procedure" is unnecessarily bureaucratic, and the Government might do better to support European-wide harmonizing legislation to protect consumers. The AA is concerned that, should each European country introduce such a licensing scheme, a remote operator may then have to apply for multiple licenses to represent all the countries in which they operate.

- 3. Do you agree with the Government's preferred overall opinion in relation to EEA, Gibraltar and white listed operators? If not, please set out clearly your reasons and let us know if you consider any of the options, any other combination of the options, or any other options not considered in this paper, to be more appropriate.**

No, we do not agree. We continue to have underlying concerns that the extension of the Gambling Licence may have significant tax implications and result in a potential loss of remote gambling advertising spend, as outlined in our answers to the previous questions. Given that white listed countries are given this status by the Government on the grounds that their regulatory regimes are satisfactory, the proposed changes appear to bring few benefits. The AA does see possible benefits of the 'spirit of the licence' to both operators and consumers, but feels that white listed jurisdictions are already monitored closely so they do follow the 'spirit of the licence'.

- 4. Do you agree with the twin triggers - (a) a remote gambling operator transacts with and/or advertises to British consumers, or (b) locates remote gambling equipment within the UK - for requiring a licence?**

Whilst the twin triggers are in themselves reasonable, we believe that, without European legislation to harmonise standards, it could be difficult to pursue a gambling operator advertising to - or seen by - British consumers remotely, and that the difficulty of enforcement could lead to high standards of evasion. The AA believes that before introducing new licence requirements, DCMS would ideally carry out further consultation with the industry about the practicalities of its proposals. The AA also feels that such requirements could be met through an updated white list system and not necessarily by introduction of a Gambling Licence.

5. Do you agree with the definition of ‘transacting with British consumers’?

AA understands the definition of ‘transacting with British consumers’, to be a gambling transaction between an operator and a person ordinarily resident in Britain. Indicators include the provision by the consumer of residential address, their use of a British bank account, the location of their IP address, or all three of them. These seem useful indicators but as stated earlier, we question the changes proposed and believe there will be an enforcement issue.

6. Do you agree that the definitions of advertising are appropriate?

AA considers that if the Gambling Licence becomes mandatory to all remote gambling located in the UK or advertising to British consumers, it is appropriate to amend the definition of foreign ‘remote’ gambling to reflect this and therefore that foreign gambling would be understood to mean gambling that does not take place in reliance upon a Gambling Licence. This is however not an endorsement of the proposed Gambling Licence.

The definitions of what constitutes ‘advertising by remote means’ to British consumers is in the AA’s opinion valid, except for spam emails which are not a legitimate means of advertising (see response to next question).

7. Do you agree that direct mail and spam etc are a low impact and less successful form of advertising?

We do not agree that these forms of marketing (one legal, the other not) are necessarily “low impact” and “less successful” than other forms of advertising (direct mail advertising spend for gambling was approximately £16m in 2009²).

Under the current regulatory system, direct mail, email marketing and online display advertising (such as banners) by licensed gambling operators do fall within the ASA remit.

Statutory provisions apply to unsolicited communications made via electronic mail (“spam”) and are already subject to The Privacy and Electronic Communications (EC Directive) Regulations 2003³, the provisions of which are reflected in the CAP Code.

Technical solutions also exist, e.g. spam filters often fitted to computer packages.

Equally those individuals choosing to sign up Mailing Preference Service should avoid receiving direct mail from operators’ located overseas but making use of direct marketing agencies based here in the UK.

² Nielson data

³ Statutory Instrument No. 2003/2046

The Brussels-based European Advertising Standards Alliance (EASA) provides the ASA and other advertising self-regulatory bodies with a cross-border complaints mechanism, so that action can be taken regarding cross-border marketing complaints.

However, we do think it could be difficult for the ASA or Gambling Commission to pursue remote operators in other countries unless the regulatory authorities in those countries can help and are effective.

8. Do you think that we should permit the advertising of non-remote foreign gambling without the requirement for the operator to be located in a white listed jurisdiction or to hold a Commission licence?

Yes. There seems nothing to lose by this measure. This is not going to be a large amount of activity and the DCMS is anyway proposing that the Secretary of State will have powers to intervene should this become necessary for consumer protection reasons.

9. Do you agree with our initial assessment regarding approaches towards compliance of remote gambling operators that may be based wholly or partly overseas? In particular in relation to: (a) additional fees; (b) Memoranda of Understanding or other agreements between regulators; (c) requiring some presence in Britain. If not, please state your reasons why as well as the approach you consider the Government should take.

The subject of fees and requirements including whether an operator should have a presence in Britain does not fall within the AA's remit.

In the absence of EU gambling law, the AA supports the DCMS proposals to work with other regulators to establish gambling operators' compliance history and to enter into bilateral arrangements with other regulators. Regardless of whether the Gambling Licence is the mechanism to create these arrangements, the AA feels such cooperation will be of benefit to the consumer.

We urge the DCMS to consider further the merits and downsides of supporting new European legislation to provide similar levels of consumer protection across countries.

10. Do you agree with the Government's proposals relating to offences as set out above? If not please clearly state your reasons why as well as your views on the approach you consider the Government should take.

This is not part of our remit.

11. Do you think we have considered the above two restriction measures adequately? If not, please set out clearly your reasons and your views on the approach you consider the Government should take.

This is not part of our remit.

12. Do you agree that the Government should consider taking powers in legislation to implement technological enforcement measures in the future in the event it became necessary and appropriate to do so? If not, please set out clearly your reasons and your views on the approach you consider the Government should take.

This is not part of our remit.

13. Do you agree with the proposed consumer awareness raising measures that we have proposed? If not, please clearly state why as well as the approach you consider should be taken.

We have reservations over the proposed changes, though clearly any changes in regulation require appropriate consumer awareness raising measures.

The AA is supportive of British consumers being better informed regarding remote gambling and the proposal that the Commission should update its advice on remote gambling and continue to make it readily available online.

14. Do you agree with the Government's overall approach to enforcement as set out above? If not, please clearly set out the reasons why as well as your views regarding the approach you consider the Government should take.

Because of AA concerns about the changes proposed, the AA is unable to comment more fully on enforcement issues.

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