

ANNEX TO EXPLANATORY MEMORANDUM

The Gambling Act 2005 (Definition of Small Scale Operator) Regulations and The Gambling (Personal Licences) (Modification Of Part 5 of the Gambling Act 2005) Regulations

DCMS SUMMARY OF RESPONSES TO THE GAMBLING ACT 2005 CONSULTATION ON PERSONAL LICENSING

The Gambling Act 2005 (Definition of Small Scale Operator) Regulations

Question 1: Do you agree that a definition for a small-scale operator exemption should be set for all classes of operating licence, remote and non-remote?

Summary of consultee responses

There is a variety of responses to this question and no consensus emerged. This includes:

- i) agreement (the majority view of respondents) with the Government's intention to set a standard definition for all classes of licensed operator;
- ii) to set definitions which are specific or tailored to different sectors or even excluding some sectors of the gambling industry altogether – i.e. a one size fits all is not appropriate;
- iii) exemption should be restricted to non-remote sectors and not include remote sectors;
- iv) abolish or not set a small-scale operator exemption because this would undermine the integrity of new regulatory system and licensing objectives; and
- v) some firms might take advantage to alter organisational structure to take advantage of exemption.

Government response

The Government has considered the responses carefully and can confirm that it intends to set a definition for all classes of licensed operator as set out in the consultation document. The document explained that it was the stated intention of the Government and Parliament during the passage of the 2005 Act that where a licensed operator was a small organisation, to be defined through consultation at a later date, there would be no regulatory need to require the operator to hold any personal licences in addition to an operating licence. The operating licence provides sufficient means to regulate an operator and its staff. The Government still holds this view and believes that once the suitability of a small-scale licensed operator and his staff has been established (through assessment by the Commission on application for operating licence, any risks to the licensing objectives are very small. In addition, in issuing licences to organisations and individuals, the Commission has legal powers to monitor licence holders and can levy financial penalties or revoke licences; and impose new or revised licence conditions. It can also investigate and prosecute illegal gambling under the Gambling Act.

It is accepted that while a standard exemption definition may affect each sector in different ways, it is the Government's view that a more complex exemption is likely to lead to unnecessary confusion and misunderstanding in how the exemption should be applied. There was no consensus in consultation responses about how definitions, sector by sector, should be defined, and the Government does not believe that there is (yet) a model that would accommodate all parts of the industry. Therefore, in its views, an alternative more complex, exemption is likely to add to the costs of small businesses than it saves, particularly in the early years of the new licensing regime.

It has been suggested that the existence of a small-scale exemption could encourage gambling firms to alter their business structures to take advantage of it. The Government considers this to be unlikely. The cost savings available to a large company are unlikely to outweigh the extra risk or other supervisory costs that would be incurred in making the

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change. It is also possible that the exemption may set up a threshold effect which will make it difficult for a small firm to grow organically. Again, it is considered that this effect have little effect on the state of competition in the gambling industry because most firms grow by taking on multiple outlets rather than single branches. Nevertheless, it is possible for such an effect to emerge. Hence, the impact of the exemption will be kept under review in the light of new information.

In its consultation document the Government indicated that it might bring forward further proposals about how the small-scale operator definition could be modified in relation to betting operators on tracks (on-course), and consultees have raised questions about whether employees acting on-course should be required to hold personal functional licences (and therefore not benefit from the small-scale exemption). The Government and the Commission have examined the options around amending the definition of small-scale operator for this sector, but have concluded that, at the present time, there is no need for a special treatment for sector under these regulations. Instead, the Gambling Commission will require all employees of small-scale betting operators acting on-course to be named on the relevant operating licence and this will provide a suitable mechanism for regulation of these individuals. This approach will be kept under review.

The Government has therefore concluded that its preferred approach of setting a definition for all classes of operator secures all the policy objectives as debated in Parliament during the passage of the Act.

As noted in paragraph 80 of the consultation document, it is expected that few, if any, casino or bingo operators would qualify for the small-scale operator exemption as their operations are too large to qualify.

The position of holiday and home park owners is analogous to that of track owners, who are landlords for the providers of gambling operations within the overall facility. It is the franchisee, providing for example the bingo or gaming machines within the park, that would be required to be licensed, rather than the park owner as franchisor.

Definition of small-scale operator exemption

Question 2: The Department propose that licensed operators should be exempt from the requirement to hold a PML if there are no more than three qualifying positions in a management role or with compliance responsibilities and each qualifying position is occupied by a qualified person. Do you agree with this approach, and do you agree with the thresholds levels proposed for the level of qualifying positions? If not, please explain why.

Summary of consultee responses

Again, there is a variety of responses to this question and no consensus emerged on the most appropriate criteria to use for defining the small-scale operator exemption. It is acknowledged that the various measures outlined in the consultation document (i.e. size of and type of workforce, size and nature of managerial and compliance arrangements, number of premises operated, financial size of the operation and established company law criteria) all have their advantages and disadvantages and seeking to apply a definition which is consistent and fair across all sectors of the gambling industry is not easy to achieve. As such, no favoured alternative has emerged amongst the respondents.

Government response

A variety of responses were received in response to the Government's preferred approach of three qualifying positions for setting the criteria to define a small-scale operator, but at the same time it should be noted that no alternative approach emerged, which commands wide support in the industry. In response, the Government has reviewed again all the criteria as stated in the consultation document (including a combination of elements) for defining the exemption. Taking all the issues into account and seeking to identify the most practical, workable solution which is fair and valid across all sectors of the gambling industry, the Government still believes that the best way to measure the exemption is to count how many people a licensed operator has fulfilling the key managerial and compliance functions in the organisation. The Government has therefore decided to maintain its

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approach in the regulations and define a small-scale operator as an operator who has no more than three post holders with key management or compliance responsibilities provided that each post is occupied by a qualified person.

However, the Government has also reviewed the types of managerial and compliance functions that should make up the key posts, and, in light of the consultation responses, has amended the definition of “qualifying position” to list, expressly, the types of activity that count. Therefore an operator will be a small-scale operator where he has fewer than 4 “qualifying positions”. A qualifying position is one which is held by a person who, by the terms of his appointment, has primary responsibility for –

- (a) the management of the licensed activity;
- (b) the management of the financial affairs of the licensee;
- (c) ensuring the licensee complies with the requirements of the Act;
- (d) the marketing of the licensed activity;
- (e) the management of the information technology facilities used in the provision of the licensed activity;
- (f) the management of the licensed activity for a particular locality or area in Great Britain in which the licensee has at least 5 licensed premises; or
- (g) the management of a single set of premises in respect of which a casino or bingo premises licence has effect.

The Government believes this is clearer for operators, and will allow them to assess, more easily, whether they fall within the definition. This revised definition also takes account of the Gambling Commission’s proposed requirements for personal licensing. While the two approaches are not identical, since the Commission needs greater flexibility than can be provided for in the regulations (when it comes to determining who should hold personal management licences), the Government believes that the revised regulations will assist the industry and the Commission.

The Government has also simplified the definition of “qualified person” in the regulations, to link this to whether or not an individual is named on the relevant operating licence. If he is, then he will be a “qualified person”. There are transitional arrangements to deal with the need to change the names on the licence. This will ensure that the Gambling Commission maintains sufficient oversight of the key managerial and compliance personnel in a small-scale operator, without leading to over-regulations in the form of additional personal licences. The Government believes this answers concerns raised in consultation responses about the proper regulation of individuals in small-scale operators, but allows the exemption to continue to serve a needed regulatory purpose.

Question 3: Do you agree that the continuous test approach is appropriate for gaining the small-scale operator exemption and the 28 day threshold test should apply to lose the exemption?

Summary of consultee responses

There is a range of views, but the clear majority of respondents believe that the combination of a continuous test with a 28 day threshold is a sensible and flexible approach, and on balance is the best way of meeting the interests of the Gambling Commission and the industry. One respondent thought the exemption should be tested on an annual basis and another thought it would be appropriate to apply a different test to each sector of the industry, which reflected the particular circumstances of that part of the industry. There was concern about the complexity of the test which could lead to confusion and a more straightforward approach should be considered. It was also suggested that the 28 day limit should be extended to three months.

Government response

The Government is pleased that the majority of respondents believe that the continuous test with a 28 day threshold is the most appropriate approach which allows the exemption to be tested continuously and to take account of occasional and temporary changes in status. Notwithstanding the concern about complexity and when the exemption

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should apply, the Government believes that on balance the best way to meet the interests of the industry and the Commission is to apply the exemption by allowing operators to gain the exemption as soon as they meet the criteria for a small-scale operator, while preventing operators from losing the exemption until they have failed to meet the criteria for a period of more than 28 days. The Government believes that the use of different tests for each sector of the industry which only make the exemption more complex and add unnecessary confusion in to how the exemption will operate.

Having looked further at the practicalities of how the exemption will operate, with a particular eye on fairness, the Government believes that the proposal in the consultation document which stated an operator can have 27 continuous days before loosing the exemption, but could not have two non-continuous days if 24 hours separated them was disproportionate. The Government has therefore decided to amend the draft regulation so that it states that the small-scale operator will only lose the exemption if he fails to meet the necessary condition for a period of more than 28 days, or for two periods of more than 14 days each, which occur within 28 days of one another. This means than an operator will be able to have a period of less than 14 days at any time, and not loose the exemption. If he has a period of more than 14 days, he cannot have a further period of more than 14 days, unless 28 days has elapsed. The Government is of the view that this approach is a fairer way of applying the threshold test.

The Government has considered consultation responses which sought a longer period before the exemption is lost i.e. 3 months. The Government believes that this is too long, and that 28 days strikes the right balance between freeing small operators from unnecessary regulation and securing delivery of the licensing objectives.

The Government therefore intends to use a combination of the continuous test and the 28 day threshold test in the small-scale operator definition regulations.

Definition of small-scale operator exemption

Question 4: Is there anything else you think ought to be included in the small-scale exemption regulations and, if so, why?

Summary of consultee responses

Respondents have raised three issues which are all concerned with the potential risk that small-scale operators (who benefit from the exemption) will pose to the aims and integrity of the new licensing system.

Government response

The Government understands these concerns, but it should be remembered that, in handling operating licence applications, the Gambling Commission will be assessing not only the suitability of the applicant to provide gambling facilities but also the key personnel concerned in the management of the operation (who will need to be named on the licence if the operator is a small-scale operator). This will include an assessment of the integrity, competence, and financial and other circumstances relevant to the application before an operating or personal licence is issued. Therefore Government and the Gambling Commission do not believe that the provision of a small-scale operator exemption will undermine the integrity of the new licensing regime. It is a means for ensuring that the principles of better regulation are followed, without compromising the licensing objectives.

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Definition of small-scale operator exemption

Question 5: Is there anything else that we intend to include in the Regulations that you disagree with and, if so, why?

Summary of consultee responses

Two responses about why the exemption cannot be applied more widely for people working in the bingo and casino sectors and sought clarification in the draft regulations which refer to an operator not holding any premises licences before the exemption is applied.

Government response

The Government does not intend to make any further changes to the regulations (other than those outlined in response to question 2 above), but can confirm that the reference in the draft regulations to an operator not holding a premises licence is a drafting error and should not have been included.

The definition for the exemption is that someone providing facilities for gambling (who holds or is applying for an operating licence) will be a small-scale operator and thereby not required to hold any personal licence, if that operator has:

- i) no more than three positions in the organisation with responsibility for key compliance and management matters; and
- ii) each qualifying position is occupied by a qualified person.

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The Gambling (Personal Licences) (Modification Of Part 5 of the Gambling Act 2005) Regulations

Question 1: To avoid confusion and to bring clarity between the operating and personal licensing regimes, it is proposed to expressly exclude or modify sections of Part 5 in relation to personal licences in Part 6 where it is concluded that Part 5 is inappropriate or inapplicable. Do you agree with this approach? If not, please explain why

Summary of consultee responses

In terms of consistency and transparency, all respondents agree with the Government's preference to make regulations expressly excluding or modifying specified provisions of Part of the 2005 Act in relation to operating licences in their application to personal licences is a sensible approach. Clarification is sought around sections 82 (social responsibility) and 83 (return of stakes to children) over whether modifications to these sections will render personal licence holders are criminally liable for matters not within their direct control. Also clarification of the likely use by the Commission of modified section 88 (Information) is requested.

Government response

The Government is pleased that all respondents support its approach. The Government will now make regulations (as set out in the consultation document and to come into effect from 1st January 2007) under Section 128 expressly excluding or modifying sections of Part 5 in relation to personal licences in Part 6 where it has been concluded that sections in Part 5 are inappropriate or inapplicable.

The Government has noted the concern expressed by several respondent bodies that the proposals to modify sections 82 and 83 will make personal licence holders criminally liable for matters not within their direct control or for acts and defaults of their subordinates. In practice, however, these concerns will be largely theoretical, since the Gambling Commission will treat any compliance and enforcement matters in the light of the facts of each case and also proportionately, in accordance with the principles of Better Regulation. For instance, it intends to discuss any potentially contentious compliance and enforcement decisions before a formal determination is made, as well as allowing personal licence holders access to a Panel of its Commissioners, if necessary. It would not undertake potentially costly court proceedings against an individual unless it felt sure of its grounds and considered the breach significant enough to merit such action – in many cases it would implement other remedies, such as increasing the level of compliance tests or levying a financial penalty. All these protections lead to the conclusion that it should only be on rare occasions that a personal licence holder would be deemed to have committed what could become a criminal offence before the courts. Furthermore, the Government has considered if the operating licence holder would in all cases exercise sufficient control, thus rendering it unnecessary to apply these two sections to personal licence holders at all. The Government can envisage instances when the operating licence holder should not necessarily bear the responsibility but the personal licence holder should, including where the breach related to the actions of his own staff - for instance, if a reputable operator could be shown to have complied with its own training and management protocols and, despite that, a personal licence holder allowed some prohibited activity to take place (such as allowing a self-excluded individual to enter premises and gamble or allowing money laundering activities), then it could be appropriate to apply a sanction to the individual and not to the operator. Consequently, the Government has decided that sections 82 and 83 should apply to personal licence holders. However, one amendment is being made to section 83 in that any personal licence holder who does not have authority under the terms or conditions of his appointment to act in the way required in respect of returning stakes or refusing to pay out prizes will instead be obliged to take all reasonable steps to inform a person who does have the appropriate authority of the relevant matters relating to the child or young person. This will avoid operators being forced to make changes to the way they run their businesses or the level of delegation that they choose to entrust their staff with.

In relation to the application of Section 88, the purpose of this modification is to promote information exchange between the Commission, licensed operators and personal licence holders to ensure that gambling is undertaken in a fair and open way. The type of information which could be covered might include information concerning cheating or breach sporting rules. The facility to share information is considered essential for the Commission in fulfilling its licensing objectives and the modification of section 88 in relation to personal licence holders will help the Commission achieve a uniform approach across all sectors of the gambling sectors.

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Modification of Part 5 regulations

Question 2: Is there anything else you think ought to be included in the regulations to expressly exclude or modify Part 5 of the Gambling Act as applied to personal licences, and why?

Summary of consultee responses

It has been requested that Section 79 (scope of powers to attach conditions) should be expressly excluded from regulations applying to personal licences as there is concern that licence holders could be held responsible for matters not within their direct control or for acts and defaults of their subordinates. In addition the issue has been raised about the possible impact of Personal Functional Licences being applied to parts of the betting industry. Until the proposals are consulted upon, it is not possible to determine whether further modification or exclusion of Part 5 to personal licences is required.

Government response

The Government does not accept that Section 79 of the Act should be excluded completely. The draft regulations in the consultation paper already modify section 79 to omit, or amend those aspects of the scope of conditions that are considered inappropriate for personal licences. The fact that the remainder of section 79 applies to personal licence holders does not mean that conditions on these matters will automatically attach to any licence. The Gambling Commission or the Secretary of State would need to determine that a particular condition in one of these areas was needed and then apply it suitably. In these circumstances, the Government does not see any need to further modify section 79 beyond that already contained in the regulations.

As indicated in the answers to the small-scale operator consultation, there is no intention at this stage to require personal functional licences for those working for on-course as betting operators. However, the Government and the Gambling Commission have worked together on these proposals to ensure that employees of betting operators will be named on operating licences, where the operators are small-scale thereby delivering appropriate regulation.

Modification of Part 5 regulations

Question 3: Is there anything that we intend to include in the regulations that you disagree with and why?

Summary of consultee responses

One response and no change required.

Government response

The Government does not intend to make any further changes to the regulations.

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LIST OF RESPONDENTS TO PERSONAL LICENCES CONSULTATION DOCUMENT

1. A&S Leisure Group Ltd
2. Association of British Bookmakers
3. BACTA
4. Bingo Association
5. Betfair
6. Business In Sport and Leisure Ltd
7. British Casino Association
8. British Holiday and Home Parks Association
9. Carlton Bingo
10. Gala Coral Group
11. Kerzner International
12. Lawyers' Christian Fellowship
13. Methodist Church
14. Racecourse Association Ltd
15. Racecourse Promoters Association
16. Rank Group
17. Remote Gambling Association
18. Responsible Gambling Solutions Ltd
19. Transport & General Workers Union
20. Welsh Language Board