



## The Wiggin Front Runner Issue #1

In some of Wiggin's recent outputs – our blogs and articles - we have been – on reflection – a little gloomy with pessimism about the direction that the public debate on gambling is taking. Given the fondness of our industry for a sociable time, 'Dry January' must have been hard enough anyway. The good news is that we are in a far cheerier mood for this edition of the Wiggin 'Front Runner'. ICE was a particular high point - the symposium was as busy as ever. The electricity of entrepreneurialism that runs through any gambling industry event is a welcome counterbalance to all the naysayers and the size and energy of ICE cheered us all up - even made the dead-end trips on the Woolwich Arsenal DLR line worthwhile (duffers as we are, we should of course have been on the Beckton line for EXCEL). If ICE was a collective success, our individual hero of the hour is Gurbir S. Grewal, Attorney General for the State of New Jersey. Mr Grewal is a state official and, given the position that lawyers occupy in the public sector in the US, presumably a person to whom political opportunities are open. Judging by the tone of his correspondence, he also seems to be a person disinclined to back away from a bust-up, including with the behemoth that is the U.S. Department of Justice. In response to the DOJ's sudden reversal of its 2011 opinion on the Wire Act, Attorney Grewal fired in a 'Freedom of Information' request to the DOJ. It pulls no punches. The DOJ, he writes, *'has no good reason for its sudden reversal; it recognizes that states have been relying on its prior advice, yet it cannot point to any intervening facts or information to justify such an about-face'*. Nor is Mr Grewal under any illusion about the reason for this capricious volte-face: *'...most troublingly, press reports have indicated that pressure to reconsider the 2011 Opinion derived not from intervening facts or law, but from lobbying efforts...[pressure groups] were unable to persuade Congress to amend the Wire Act...a legal analysis prepared by lobbyists...was passed on to a 'top ranking official in the Justice Department' by an outside law firm headed by a former Department of Justice official...the ensuing DOJ memo 'hewed closely to arguments made by [the] lobbyists...'*. We commend Mr Grewal not only for speaking truth unto power but, more widely, for daring to think and write of gambling as if it's any other tax-paying and job-creating digital industry, a heresy last witnessed in England under what we're now told was the evil right-wing rule of Tony Blair. When James Wolfe took Quebec from the French in the great annus mirabilis of 1759 his detractors told George II that he has mad. 'Then I wish he'd bite some of my other generals' replied the monarch. If Mr Grewal wanted to come across the Atlantic and nip some of our politicians, administrators and journalists, then lunch would be on us.

And we're going to need some Grewal-type spine in the months ahead. No-one – but no-one – in the industry wants to take a penny from a player who is in trouble, to any degree. It's meant to be fun, competitive and above all, affordable and controlled. So when the Responsible Gambling Strategy Board in the UK writes to the British regulator that *'Gambling, and the extent of harms associated with it, is a significant public health issue for Great Britain'* they cite the number of 'moderate risk gamblers in the British population as 0.9% to 1.5%. Put another way, some 98.5% to 99.1% of the population are unaffected. By contrast, in 2014 62% of adults in England were classified as overweight (a body mass index of 25 or above) or obese (BMI more than 30) and predictions are that some 30% of the population could soon be obese – perhaps some 20m people. A BMI above 30 suggests a reduction of 4 years in life expectancy which is something the writer would indubitably see as a *'significant public health issue'*. It is difficult to try to bring some sort of perspective to problem gambling because so many of the individual stories are so genuinely tragic, and calls for 'perspective' and sensible, evidence-based reactions get misinterpreted as complacency, or worse, callousness to the genuine suffering of individuals. But let's take our lead from Mr Grewal and speak and write and think for ourselves, objectively and based on evidence and common-sense. If we can be brave enough to do that then it'll be the first step to start to deflate the hysteria around an industry which serves the vast, vast majority very well.

This issue of the Wiggin 'Front Runner' is an explosive blockbuster. As well as serving our clients we have been blogging, conferencing, editing, publishing and generally philosophising about the industry we work in. We cover a wide variety of the concerns of the day. We deal with the long-anticipated Dutch liberalisation, the shenanigans with the Department of Justice's volte-face, the developing debate in the UK and fiscal concerns across regulated markets. Don't go anywhere else, it's all here!

### **Gambling Commission consults on the issue of gambling online with credit cards and tougher gaming machine controls**

After much discussion, the UK Gambling Commission ("**Commission**") has today invited members of the public, gambling businesses and other stakeholders to provide their views on the issue of gambling online with credit cards and, separately, on improving player control measures on all Category B gaming machines.

Last year the Commission backed the principle that consumers should not gamble with money they do not have and as a



result the Commission today launched the [call for evidence on gambling with credit](#). This is effectively a consultation that seeks to obtain any information that will enable the Commission to develop a comprehensive picture of gambling with credit cards as well as understanding if there are any effective harm prevention measures that might serve as robust alternatives to prohibiting or restricting gambling with credit cards. Once the Commission has processed this information, it will advise on what restrictions, potentially including an outright ban, are necessary to limit risks to consumers.

In April, the maximum stake on Category B2 gaming machines (Fixed Odds Betting Terminals) will be reduced from £100 to £2. However, data received indicates that the risks associated with Category B1 and B3 machines are broadly similar to the risks with B2 machines at a £100 maximum stake. As a result the Commission have launched their [call for evidence on player protections on Category B gaming machines](#) which will review more recent data to evaluate changes in player behaviour before and after the B2 stake reduction. This will help the Commission identify whether problematic play on B2 gaming machines has been diverted onto other category B machines. Additionally, the consultation aims to explore options to conduct further analysis in the longer term to monitor the impact of player protection controls on Category B machines.

Further information on this can be found [here](#).

### **Dutch government confirms the opening of the market**

On 19 February 2019, the Dutch government approved its long-awaited gambling bill that will create a regulatory framework for the opening of the online gambling market in the Netherlands. The bill, which was first submitted to the lower house of the Dutch parliament back in 2014, provides for the introduction of a licensing regime for online gambling in the Netherlands that will allow private operators to obtain a local licence. The Netherlands will *finally* become a regulated market.

The government also published a number of secondary motions which, among other things, contemplate the introduction of a two-year blackout period for operators that have been “directly” targeting the Dutch market. Naturally, this particular motion has caught the attention of interested stakeholders and media outlets but amid all the speculation it remains unclear how this will be implemented in practice.

The date of entry into force will be determined by means of a royal decree, although implementation of a licensing regime will not likely emerge for some time. Nonetheless, it is most certainly welcome news to those that have been watching the Dutch online gambling market with abated breath over the last decade.

### **Fiscal uncertainty in regulated markets – reading the mood music**

The lack of balance in fiscal policy for gambling activity across Europe is particularly evident in relation to advertising policy and, of course, taxation. The rise in anti-gambling sentiment from media outlets and certain political parties has made the gambling sector an easy target for legislative changes in these areas. These changes are expected to have a material and negative impact on operators.

For gambling advertising, most policymakers in regulated markets across the EU are striving to find the correct balance between allowing operators to market their services and protecting children and other vulnerable people from exposure to any at risk messaging.

The fact that the UK has permitted gambling advertising to be aired during live sports broadcasts for a number of years was called out as a particular threat to minors and young men aged 18-30. The Remote Gambling Association has taken what is seen by many as a big step to self-impose a whistle-to-whistle ban on gambling advertising during live sports coverage televised in the UK before 21:00. However, Italy’s blanket ban across all advertising media, including sports sponsorship, and the impending restrictions to gambling advertising in Belgium and Spain, serves as a stark reminder of just how far some governments are prepared to go.

Plenty of British politicians are in favour of regulation that brings the UK closer to Italy and it is not just banning television advertising that some advocate. GambleAware’s commissioned research on the impact of marketing on children and other vulnerable people, as well as the Gambling Related Harm APPG’s intention to explore the wider issue of gambling-related harm in the UK are going to, no doubt, influence the direction of British advertising policy, if not resulting in legislative change, over the coming year or two.

Turning to taxation, the impending increase in remote gaming duty in the UK from 15% to 21% is rightly seen by many as the UK treasury’s solution for plugging the hole created as a result of the stake restrictions imposed on FOBTs. However, it is symptomatic of a trend across Europe which highlights that governments recognise that raising taxes on industries associated in the media with potential social harm is unlikely to raise too many eyebrows.



The Italian government is moving ahead with proposals to raise an estimate €770m from the gambling industry in 2019, as the government hikes online and land-based taxes in an attempt to balance its books. Over Christmas, the Romanian government introduced a 2 percent tax on turnover for online gambling on top of the existing tax of 16 percent on gross gaming revenue due from all gambling operators. These immediate changes were part of the Romanian government's hunt for additional cash to prop up its costly social welfare policies. The Romanian gambling regulator has since clarified that the calculation of the recently introduced tax is based on players' deposits and not turnover.

So how should the industry respond?

Some commentators are suggesting that operators focus more on grey market revenues, which are less susceptible to the impact of advertising and taxation initiatives but bring their own challenges. This, however, feels like a sticking plaster and, taking a long term view, the industry needs to continue apace with the recent momentum around the pro-active steps it can take to improve its image as a regulated and safe leisure pursuit (as it is for the vast majority of customers). Self-regulation around advertising and responsible gambling initiatives in the UK are a good start, but effective PR and lobbying are needed to bring this to the attention of the general public if the mood music is going to change.

### **DOJ creates confusion for US iGaming by reversing Wire Act position**

On 14 January 2019, the US Department of Justice (DOJ) issued a new [opinion](#) on the Wire Act 1961. The 23-page opinion, dated 2 November 2018, reversed the DOJ's 2011 [opinion](#) that "*interstate transmissions of wire communications that do not relate to a "sporting event or contest" fall outside the reach of the Wire Act*".

By contrast, the latest opinion states that "*having been asked to reconsider, we now conclude that the statutory prohibitions are not uniformly limited to gambling on sporting events or contests*". It concludes by stating that "this opinion supersedes and replaces our 2011 Opinion on the subject".

Although there had been no specific request from the states to the DOJ for guidance on internet gambling, as had been the case with the 2011 opinion, rumours had been circulating for some time of a change of position, particularly given the vocal opposition to online gambling from some senior figures in the Republican party (like Senator Lindsey Graham) and Sheldon Adelson, one of the largest donors to that party. [The Coalition to Stop Internet Gambling](#), a group funded by Adelson, [stated](#) that it was "*pleased*" that the DOJ had reversed the 2011 opinion, which it said was "*as problematic legally as it was morally*".

So what happens next?

An opinion from the DOJ is not law, so there are now two contradictory opinions from the DOJ on the same legislation. Given that the 2019 opinion argues that non-sports wagering on an interstate basis (i.e. transactions that occur between two different states) is unlawful, this suggests that the current poker sharing agreements (which allow operators in Nevada, New Jersey and Delaware to share liquidity) may be affected. The question of what happens to intrastate transactions (i.e. transactions that occur in only one state) made over the internet is also in question, as the 2019 opinion suggests that criminal charges can be brought even where the interstate transmission of information is incidental to gambling that is lawful under state law. This would also affect online casino, online sports betting and online state lotteries (the source of the requests for the 2011 opinion).

As ever with US iGaming, there is confusion as to what happens next, and a lot more questions than answers. Is the DOJ just signalling what it wants the industry to do, or will it actually prosecute companies involved in online gambling? And if it does prosecute, what types of online gambling will it target? Or will states that believe that the 2019 opinion is wrong seek a "Declaratory Judgement" due to uncertainty over what enforcement action the DOJ might take?

On 5 February 2019, the attorneys general of New Jersey and Pennsylvania, two of the states which had legalised sports betting following the repeal of the Professional and Amateur Sports Protection Act 1992 (PASPA), wrote to the DOJ (the acting Attorney General and the Deputy Attorney General). The [letter](#) stated that the "*about-face*" in the 2019 opinion "*is wrong and raises significant concerns in our states*".

Lawyers and analysts are now speculating, creating uncertainty that may slow, or stop, investment from companies so recently encouraged that the US offered great opportunity after the repeal of PASPA. Federal legislation remains unlikely, given the current stasis in the American political system, although such legislation might not benefit the industry in any case, with the prospect of additional restrictions and sports leagues lobbying for a share of betting revenue. And there would be constitutional implications of the federal government seeking to legislate in an area where the states are traditionally pre-eminent. Indeed, the letters from the attorneys general concludes by stating that the 2019 opinion "*undermines the values of federalism and reliance that our states count on.*"



It seems like only a court can deliver clarity to the questions above, meaning that litigation is likely in almost any scenario.

## **New rules introduced to make gambling fairer and safer**

Following an open consultation, the Gambling Commission has today announced new rules which will come into force on 7 May 2019. Online operators will be required to enhance their verification process, as well as ensuring they are carried out in a timelier manner.

The new rules require remote licensees to:

- verify, as a minimum, the name, address and date of birth of a customer before allowing them to gamble;
- ask for any additional verification information promptly;
- inform customers, before they can deposit funds, of the types of identity documents or other information that might be required, the circumstances in which the information might be required, and how it should be supplied to the licensee; and
- take reasonable steps to ensure that information on their customers' identities remains accurate.

It is hoped that these changes will help operators prevent harm or detect criminal activity at a quicker rate as a result of them holding more information about their customers.

As well as preventing the risk of underage gambling through a stricter verification process, the Gambling Commission hopes that the new rules will increase the likelihood that someone will be identified if they attempt to gamble while self-excluded. This is because effective verification by operators will mean that a customer will not be verified, and therefore unable to gamble, until they provide correct details. These details will then be checked against both the operator's own self-exclusion database and the verified data held by [Gamstop](#).

You can read more about this [here](#).

