



# Expert insight for the gambling sector

**WIGGIN**

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# Foreword

There were times in 2018 when stakeholders in the British remote gambling industry probably felt that Brexit headlines represented a form of light relief from the continuing attentions of the press, politicians and regulators. More and higher regulatory fines and a plethora of new rules and guidance arrived, requiring lessons to be learned and policies and processes to be adjusted at breakneck speed. However, the Brits were not alone. From the Italian advertising ban to Dutch enforcement action to German court cases, a myriad of challenges have been thrown at the sector. Rather than dither over the possible downside impact, industry participants have generally sought to meet these challenges head on. There is a growing acknowledgment that, whilst there remains a compelling case for online gambling as a form of digital entertainment which is safely enjoyed by most consumers, mistakes have previously been made around the approach to customers, the volume of advertising and ill-fated lobbying efforts which ought not be repeated.

We work across the sector helping stakeholders to navigate these developments. Wiggin offers Europe's largest team of dedicated betting & gaming specialist lawyers, whose expertise and experience cover all aspects of remote gambling. Starting with our embedded relationships with some of the very largest players in the business, we represent clients across multiple jurisdictions all the way through the gambling supply chain, including bringing our unparalleled industry insight to support the latest and most exciting start-ups.

On any day, the Wiggin team will be advising a global business on its latest cross-border gambling merger or acquisition, a remote operator on its

choice of domicile and licensing regime, a payment provider on its multi-territorial risk rationale, a media conglomerate on its white label gambling outsourcing, a mobile business on its social responsibility obligations, a games licensor on its latest suite of integrations, a bookmaker on its terms and conditions and promotional offers, and any number of businesses on their licences, compliance obligations and disputes with regulators across the globe.

Wiggin sits within a network of international experts with practices comparable to our own, carefully selected over years of our immersion in the remote gambling industry as the 'best of breed' in over 70 jurisdictions. We are at the centre of a matrix of gambling law and regulation expertise second to none, and our clients recognise the benefit of having us on their side.

We hope you find the articles in this brochure thought-provoking, and we would be delighted to discuss the issues raised with you.

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# Remote Gambling in Great Britain – version 2.0



It is less than five years since the Gambling Commission of Great Britain (the “**Commission**”) began to regulate the remote gambling industry on a point-of-consumption basis. In the intervening period, it is fair to say that the Commission’s understanding of the complexities of the industry have rapidly developed from a relatively low base to it now being the most demanding regulator of remote gambling in the world.

The commercial consequences of regulation are now becoming fully apparent to an industry that had, in the fifteen years prior to its regulation by the Commission, experienced exponential and sustained growth. This has been replaced by a succession of high-profile enforcement actions brought by the Commission against many of the industry’s leading operators, creating a period of uncertainty and unease. It has even led certain operators for whom Great Britain is a key market but by no means their main market, to consider their future in it.

Those days of rapid growth in the UK (and probably Europe generally) is thought by many to be over. These days, the smarter operators are spending more time talking

about “sustainability” and “market share” rather than “market growth”, having realised they need to work with regulators to design social responsibility processes that seek to interact with customers early and assist them in managing their gambling spend. Rather than simply make every effort to remove any at-risk players from their business and kick the can down the road to less scrupulous operators, they aim to retain customers for the long term.

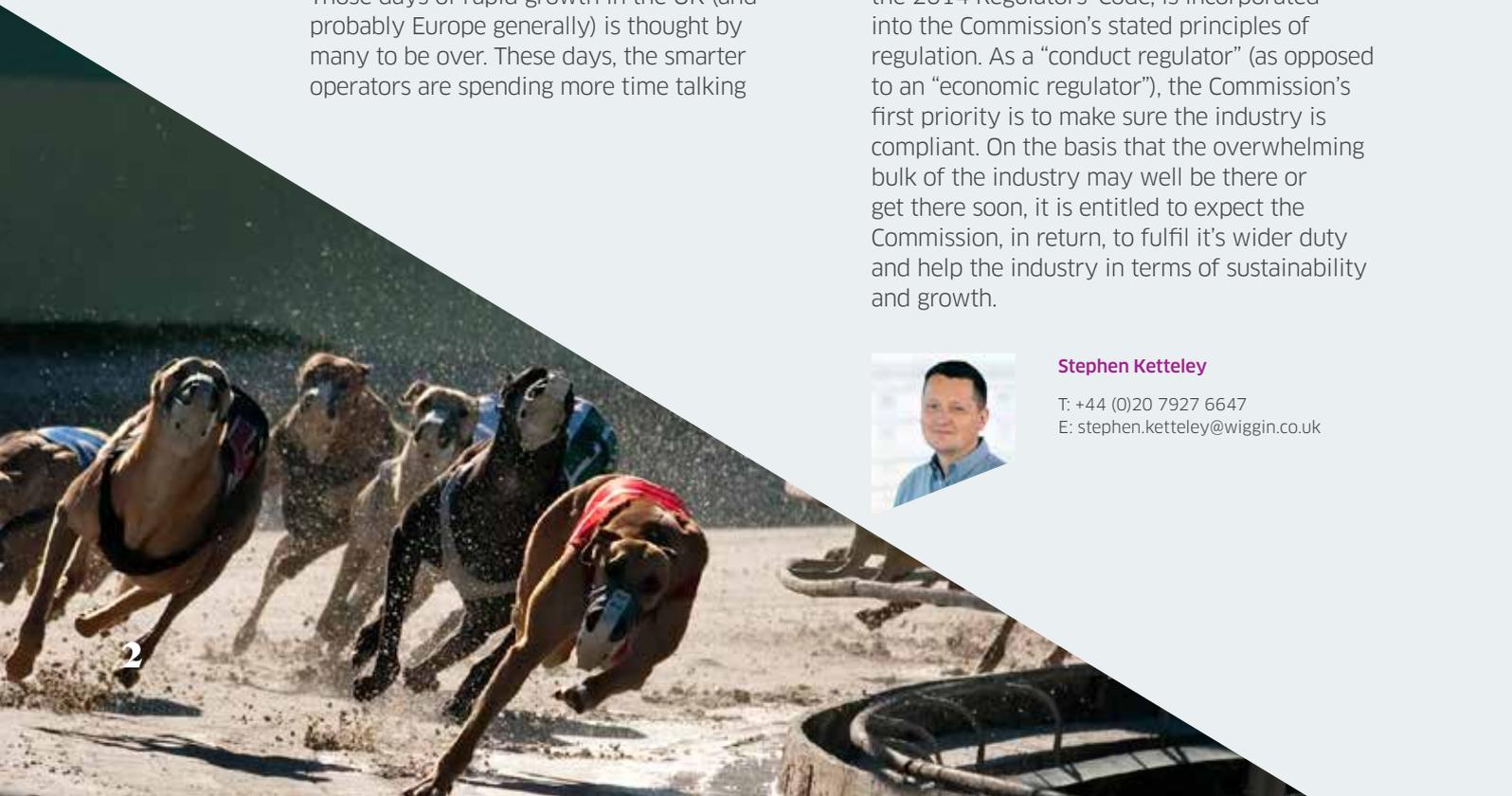
The industry must, as a whole, grasp this nettle and really engage with some of the thornier issues it is being presented with. Most operators are doing so, particularly those 5 or 6 operators that in aggregate boast the overwhelming majority of British market-share. If they keep that momentum up then they will lead the industry towards systemic compliance.

At that point, the Commission’s role will need to adapt from one of pure enforcer to one that “considers how to support or enable economic growth” in the industry. This phrase, taken from the 2014 Regulators’ Code, is incorporated into the Commission’s stated principles of regulation. As a “conduct regulator” (as opposed to an “economic regulator”), the Commission’s first priority is to make sure the industry is compliant. On the basis that the overwhelming bulk of the industry may well be there or get there soon, it is entitled to expect the Commission, in return, to fulfil its wider duty and help the industry in terms of sustainability and growth.



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# The regulatory landscape – is the clock turning back?



France opened its markets (some of them, and unsuccessfully) to remote gambling operators as far back as 2010. Before that, Italy had liberalised, afterwards countries like Spain and Denmark did so. As the unattractiveness of state monopolies became apparent, the impossibility of policing the internet became clear and the perennial desperation for other people's money took hold of European governments even more powerfully after the financial turbulence of 2008/9. EU countries progressively liberalised their gambling regimes to license and regulate online operators. Some held out, more or less, but by 2019 most decent-sized EU markets had come to offer licences of one sort or another, and tax and regulatory regimes where, to differing extents, it is possible to do business, even if that means hooking up with a local land-based casino or bookie. We are, in 2019, in a position that ten years ago we could only dream about – regulated, liberalised markets across Europe with tolerable fiscal rates and sensible regulation. Even the Russian bookmaking market is folding back the duvet and inviting western businesses to hop into bed.

All this political and regulatory progress is, however, beginning to look under threat. Social and political feeling has hardened, radicalised and polarised across Europe since 2010. Some commentators call it 'populism', others see it simply as ordinary people tired with the "out-of-touch" elites who don't share their daily difficulties or even care about them over much. Either way, the mood is amply powerful enough to sweep across the gambling industry. Anyone who looks like they are making a bit of cash is fair game for some hatred these days, but when you can spice the mix with a little bit of faux-moral righteousness then things get out of control very rapidly. The British political class and media is in full war mode against the industry, on the basis that it is a public health epidemic. A notable British politician recently referred to the industry as 'the Beast'.

Actual verifiable problem gambling in the UK has remained statistically low and has been so since the inception of the remote gambling industry. How a product where an overwhelming majority of people, by any statistical measure you choose, have no problems whatsoever, can be characterised as a health epidemic is something that only a politician with an axe to grind can explain...or more likely evade explaining.

One expects Scandinavians to be a bit calmer, but in Sweden an entirely unexpected last-minute political initiative forbade operators to give players more than one bonus in their account lifespan, causing a massive CRM headache for operators seeking to establish market share. The Norwegian authorities are also perking themselves up for yet another attempt to hold back the deluge. All that said, the industry hasn't exactly covered itself in glory. The Swedish regulator Camilla Rosenberg probably had a point when she said, about gambling advertising, "The Swedes are exhausted by it... If you watch TV or open a magazine you can't avoid it, people are really irritated". It is very much time for the industry to mobilise and tell the good side of the story – the jobs, the technology, the huge tax contributions, the genuine improvements in customer care, the voluntary limits on sports advertising, the new self-exclusion databases – and let's make sure that our house is in order so that the message isn't undermined by any own goals.



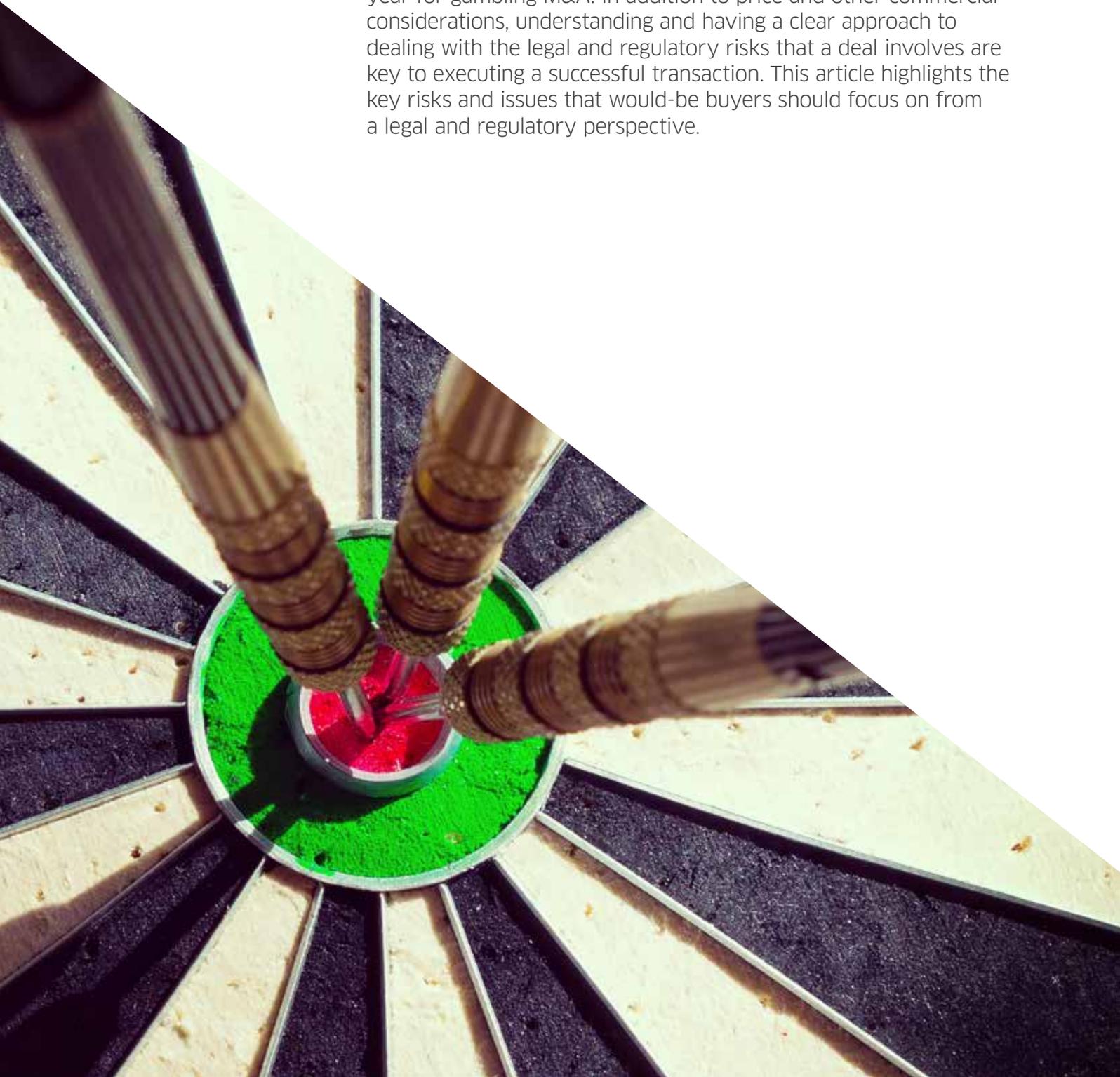
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# Gambling M&A: legal and regulatory redlines for buyers



2018 continued to see major consolidation in the industry, and with the opening up of the US presenting new opportunities and operators continuing to need scale and to look further afield to survive in a regulated world, we expect 2019 to be another active year for gambling M&A. In addition to price and other commercial considerations, understanding and having a clear approach to dealing with the legal and regulatory risks that a deal involves are key to executing a successful transaction. This article highlights the key risks and issues that would-be buyers should focus on from a legal and regulatory perspective.



## Regulatory consents

With operators and suppliers often holding multiple regulatory licences, plotting a way through any approval process is critical – no one wants the uncertainty that a gap between signing and closing creates. Establishing what is required early on and agreeing an engagement process with regulators will help to align expectations and expedite completion of the transaction.

## Regulated vs unregulated revenues

Buyers should carefully consider any material differences (both current and historic) in the regulatory risk rationale of their existing business and the target business to ensure alignment around current and intended future market expansion and to avoid alienating investors. Beware the trap door of “bad actor” provisions in certain markets!

## Technology ownership

It is not uncommon to find that a target does not have the proprietary technology rights they think they do. Where development is outsourced, it is key to examine the legal agreements to validate ownership.

## Key supplier arrangements

On a B2C deal, synergy-planning very often focuses on rationalising the number of suppliers across the enlarged group. Agreements with platform and content providers are often complex and must be looked at carefully in the context of exclusivity, change of control and termination to see what is in the art of the possible.



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## Compliance

The increasing complexity of regulation (including in relation to areas such as data privacy, AML and advertising) together with more regular and draconian regulatory interventions means that compliance should be a key focus of any diligence exercise. Buying a business which is undergoing a process of regulatory intervention is possible but must be handled with care.

## Brand protection

Fast growing businesses often do not have time to focus on protecting their brand in the context of future international expansion. Some simple and early checks can help uncover any major gaps in a trade mark portfolio and the potential for registration.

## Talent incentivisation

As with other creative and tech focussed industries, acquisition structures involving gambling companies often need to cater for the retention of founders or key management. Earn-outs, put and call option structures and long term incentive plans are often used to deal with this, but the trick is ensuring that the KPIs by which performance is measured align the interests of the acquirer and the talent whilst taking into account the dynamic nature of the sector.

Although deal pricing and cost savings are often the first gating items in establishing if a potential deal has got legs, the legal and regulatory issues highlighted above shouldn't be too far behind.



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# GDPR One Year On



It has been (about) a year since GDPR came into force. I'm sure many of you wish to forget the weeks before GDPR and the uncertainty surrounding the new legislation, particularly how to reconcile gambling regulatory obligations with GDPR; the debate over whether your business needed a DPO; and, of course, where on earth one could find a DPO. And without wanting to bring up bad memories, now seems a good opportunity to look at what we have learnt in the last year.

The first thing we learnt was that the sky did not fall as some had predicted and supervisory authorities did not abuse their powers on some form of 'fining spree'. That being said, we have seen some significant enforcement action: Google was fined €50,000,000 by the CNIL (the French supervisory authority); and Facebook was fined £500,000 here in the UK by the ICO for pre-GDPR breaches (and the ICO has stated that had these offences occurred post-GDPR the fine would have been substantially more). So, whilst there hasn't been consistent significant enforcement action as some had predicted, the possibility of it remains and therefore GDPR compliance must be seen as an ongoing project.

We also learnt that fears about huge increases in the number of subject access requests received by operators were justified. Rights requests, where controllers can no longer charge even a nominal fee, have been somewhat weaponised, with many examples of players using these to make the life of an operator difficult. The courts have found that there is an extremely high bar for a controller to refuse a request so our advice remains that controllers should treat all requests received as valid unless there are exceptional circumstances.

Finally, we have learnt that players will use the right of erasure (or 'right to be forgotten') to try to get around gambling restrictions or self-exclusion. Operators should be aware that this right is qualified and there will be circumstances where you cannot simply delete a player's data on request. These circumstances would include receiving an erasure request from a self-excluded player.

We have of course learnt a great deal more in the last 12 months. And whilst the sky has not fallen we strongly advise that all controllers (and processors) continue to keep GDPR compliance on the agenda to ensure that they do not draw the attention of the supervisory authorities.



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## Selecting media to avoid directing gambling advertising at under-18s



For as long as remote gambling advertising has been permitted in Great Britain, it has always been a breach of the UK Code of Non-broadcast Advertising and Direct & Promotional Marketing (CAP Code) to direct gambling advertising at those aged below 18 years (or 16 years for football pools and certain other specifically permitted/licensed venues/events or for Category D gaming machines) through the selection of media or context in which the advertising appears. In fact, prior to 2007, the CAP Code already provided for this in respect of non-remote gambling advertising and CAP believed that, together with the proposed package of general principles and content rules, extending this rule to all gambling advertising would ensure that all non-broadcast gambling advertising was both responsible and not of particular appeal to children, whilst permitting media owners some flexibility around where to place such advertising.

Yet, it was not until late in 2007 that platforms such as Facebook started to carry paid for advertising. Twitter did not launch promoted tweets until 2010, the same year that Instagram launched – in fact, social media was not in the remit of the Advertising Standards Authority (ASA) until March 2011. It is probably not fair to say that the rule around not targeting children with gambling advertising through the selection of media in which it appears is outdated (it still seems to achieve the desired objectives), but certainly the media in contemplation at the time the rule was written was very, very, different.

In the last year or so, we have seen some key developments regarding the application of this rule by the ASA when investigating complaints:

- ▶ Advertisers of age restricted products learnt that serving ads to users via digital media, where the user was logged-in to that digital media account as over the age of 18, was not sufficient to satisfy the obligation to “take all reasonable steps to exclude under-age consumers from the targeted audience by using interest-based targeting tools” (Diageo decision January 2018 and the Greentube Alderney decision September 2018).
- ▶ Separately, an upheld decision against Spotify demonstrated that even if the ad is not for an age-restricted product, if the media used to communicate the ad could be regarded as having “particular appeal to children” (regardless of the actual viewer demographic), then the advertiser is still under a duty to be socially responsible with the ads it shows using that media (Spotify decision, 17 October 2018).
- ▶ The ASA’s decision against Tombola echoed this, stating that an app which was not of particular appeal to children per se (and where it was unlikely that under-18s made up a disproportionately high percentage of the app users), was still problematic because some under-18s would have downloaded the app (given that apps were not robustly age verified on download). Because it was likely that there were under-18s in the audience, Tombola needed to demonstrate that it had taken reasonable steps to ensure that its ad was only directed at those aged over 18 (Tombola International plc, February 2019).

Some key trends are emerging from these decisions as regards the ASA's application of CAP code rule 16.3.13, namely: the lack of robustness of user log-ins on digital platforms; what "all reasonable steps" to exclude the under-18s in non-broadcast media looks like; and the fact that whether or not the ad (or even the selection of media) is of "particular appeal to children" often plays a part (if not interlinked entirely) in the ASA's consideration of the rule's application. Unless there are more robust age-verification mechanisms introduced (or targeting tools which sufficiently exclude children and young persons from the audience) digital advertising (website or apps) and social media platforms should be selected with caution.



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# Player disputes: where there's a hit, there's a writ



## Dispute resolution

The continuing success of the remote gambling industry, coupled with recent headline-making regulatory decisions, has inevitably led to a focus from claimant lawyers on perceived, exploitable cracks in the industry that might lead to pay outs for clients whose betting contracts don't turn out how they wanted.

## Who is claiming?

In addition to claims from individuals over self-exclusion issues, there is a continuing run of claims from people who have been excluded from betting or from collecting winnings as a result of 'know your client' screening. There are a significant minority of players who do not understand that operators have a duty to undertake strict anti-money laundering checks and have protective measures in place to prevent pay outs to people who may be acting in contravention of their terms and conditions. On this, the Commission is at one with the sector: it has confirmed that there is no right to bet, acknowledging that just as a player can decide whether to place a bet, a gambling business is also free to decide who it accepts bets from, on what terms, and to manage its business as it sees fit. This is usually done through the use of online terms and conditions, which have understandably tended to be lengthy.



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## Fairness for players

This is not to say that operators can do exactly as they want. Consumer protection legislation, in particular the Consumer Rights Act 2015, sets parameters on the lawfulness of terms, so that if a term is thought to be 'unfair' it will not be upheld. It is this general but unspecific test of fairness in favour of the consumer that is regarded as fertile ground for challenge by the unsuccessful players and their backers.

With current media interest in the privacy and other online policies of internet businesses, operators should expect to see further scrutiny of their terms and conditions. Following on from the investigation by the Competition & Markets Authority, operators must take steps to make these as concise and clear as possible so they can continue to rely on them to deflect the increasingly sophisticated claims being made by experienced players and professional gamblers sheltering behind less experienced individuals.

## A new claims landscape

There is much that operators can do to protect themselves. Robust terms and conditions coupled with careful, considered and consistent application and operation of those practises will mean that claims will be unlikely to succeed.

But just as with every successful industry before it, claims are inevitable, even for the most careful and considered operator. Claims handling requires a sophisticated and strategically sensitive approach to the issues in play.



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## Payments – a key battleground



A year on from our last instalment and the story remains the same as regulators in certain ‘grey’ markets, frustrated by the lack of legal tools available to attack offshore operators, look to payments for a solution.

That’s not to say there haven’t been notable developments. Quite the contrary, and it’s the usual suspects in terms of jurisdictions.

## Developments

After what seemed like an eternity of political inertia, making the British government's approach to Brexit look efficient, the Dutch finally passed their Remote Gambling Bill in February 2019. In the run-up to this we saw unprecedented levels of enforcement action against international operators for 'targeting' Dutch players. Although the ability/appetite of the KSA (the Dutch regulator) to pursue PSPs remains legally questionable, it is notable that the KSA referred to the availability of iDEAL (the Dutch payment solution) as a factor in each of the most recent enforcement cases against B2C operators. Furthermore, the KSA has indicated that continued use of iDEAL may be sufficient grounds to deny an operator access to the regulated market (for at least a period) when the new regime is up and running.

In Germany, buoyed by the decision of the highest administrative court in the land against 888's German-facing activities, the authorities have been applying pressure on PSPs by issuing letters demanding support for certain operators be withdrawn. This is despite the 888 decision being heavily criticised by local legal commentators, and the subject of challenge in the Federal Constitutional Court.

In Russia, we noted in our last edition the passing of legislation to introduce payment blocking measures and questioned how significant an impact this would have in terms of stemming the flow of unregulated gambling revenue offshore. Since then the Russian authorities have more than once publicly

reminded Russian banks of their responsibility to block card transactions that can be identified as connected to gambling. They have also finally started to populate 'blacklists' of operators whose transactions should be blocked.

Finally, the Norwegian Gaming Authority continues to claim success in its attempts to thwart offshore operators via the payments ecosystem, with the latest salvo being requests to local banks to block any attempt at payout of winnings. Any small victory would, however, seem hollow and at some point the NGA needs to wake up and smell the coffee; operators will always find a way to transact and the Norwegians would be much better off following in the footsteps of their Swedish cousins and re-regulating.

## Conclusion

The above examples illustrate that the payments sector remains an important battleground in the war waged by regulators on unregulated gambling revenue. For operators and PSPs alike, forewarned is forearmed and those who have systems in place to monitor and react to the actions of the regulators will be best placed to ensure their business is not disrupted and/or that they do not step over their own compliance red lines.



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## VR – a new reality?



In a congested and competitive market, embracing “the next big thing” can be a key differentiator. In the remote gambling world, could the next big thing be virtual reality (VR) technologies?

VR technology creates a simulated environment and presents a completely different “reality” than the one physically in front of you. The appeal for online gambling operators is obvious; potentially offering a more immersive, engaging and exciting way for consumers to interact with their games or betting services. A consumer in his or her lounge in London can suddenly be transported to a roulette table at their favourite casino in Las Vegas.

The adoption of headcams in sport could also be a game-changer for sports betting. How powerful a tool to be able to offer a VR solution whereby a consumer can watch a match from the perspective of their favourite player or ride along with a jockey as he/she crosses the line to win the Grand National. All while betting on the outcome of course!

Gambling operators who are already exploring VR likely see this as a natural response to technological advancements and a need and desire to cater to their audience, comprised of an ever-increasing pool of “millennials” - a demographic perhaps less motivated by traditional casino and betting and that wants - and, in most cases, expects - interactivity and evolution of technology.

A recent market study by Technavio predicts that the VR gambling market will register a compound annual growth rate of close to 55 per cent by 2022, and that incremental growth will be €308m between 2017 and 2022. The study posits that VR will be increasingly important for both online and land-based gambling operators, and expects mature markets, such as the UK, to lead the way.

All that being said, there remain two significant hurdles to widespread adoption of VR: (1) content; and (2) hardware. There is a symbiotic relationship between the two. Consumers must invest in the hardware and headsets in order to utilise the tech, but content creators need to attract them with engaging, cutting-edge content. The momentum is certainly there and some operators have nailed their colours to the VR mast. We now wait to see if the momentum will drive further VR investment in the gambling sector, fundamentally changing gambling operators’ strategies and materially filling their coffers. Place your bets, please!



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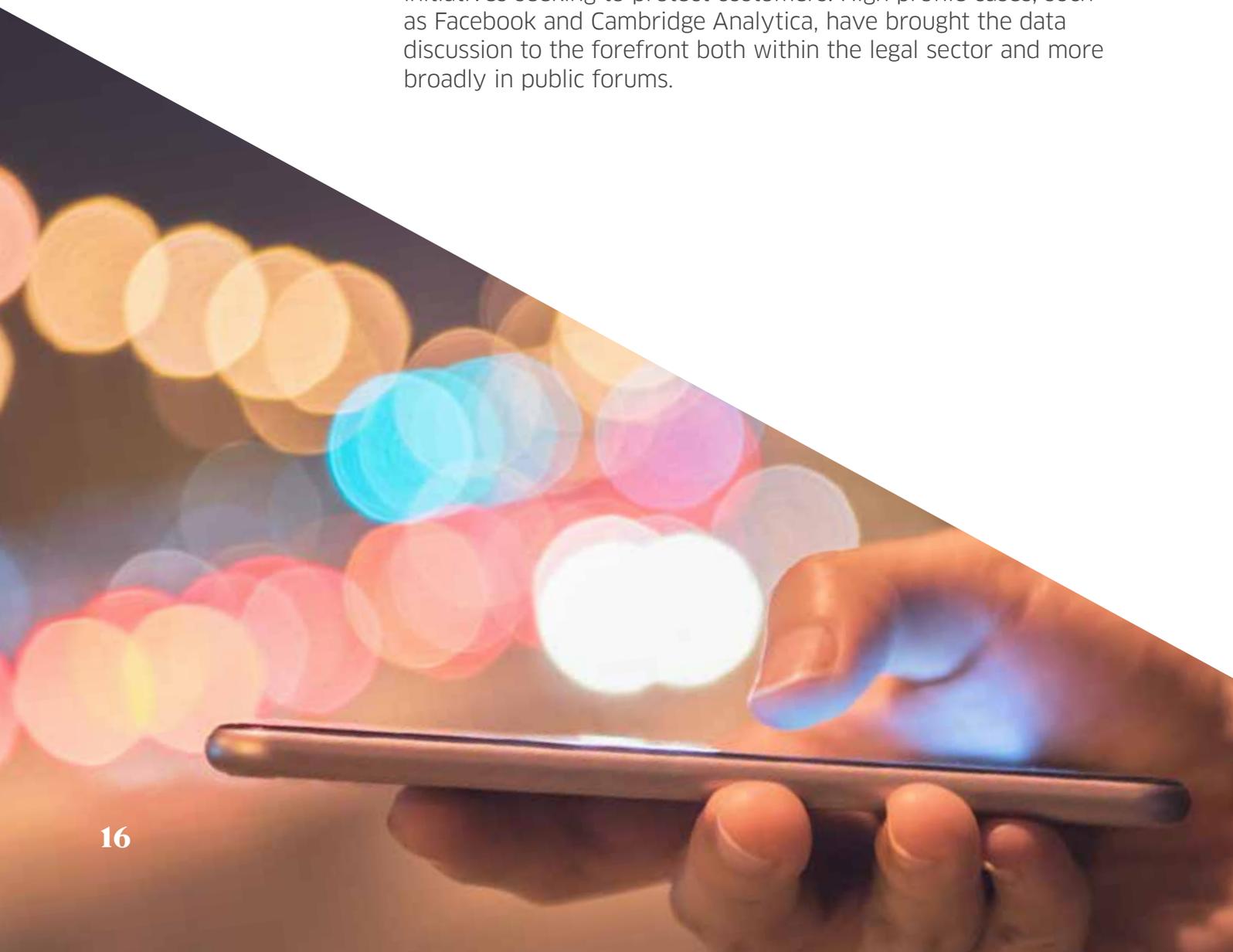
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## Responsible gambling initiatives: where data privacy and AI collide



The amount of customer data held by gambling operators is at an all time high and continues to grow as technology evolves and AI develops. Capturing useful personal data clearly provides advantages for responsible gambling initiatives, but how does this line up with data privacy laws?

The introduction of GDPR has meant that data protection laws have become tighter than ever before and this has created potential hurdles to the implementation of responsible gambling initiatives seeking to protect customers. High profile cases, such as Facebook and Cambridge Analytica, have brought the data discussion to the forefront both within the legal sector and more broadly in public forums.



## The Commission's view

The Commission has clearly expressed its position on GDPR by arguing that it is not there to prevent operators from acting in the public's interest, nor should it prevent an operator from complying with its requirements under a gambling regulatory licence. Operating licences contain conditions which require operators to put into effect procedures to: (i) allow for self-exclusion; (ii) prevent money laundering; and (iii) combat problem gambling. In order for operators to comply with these provisions they will need to obtain and process personal data, as well as retain data for a reasonable period, including so that they can evidence compliance to the Commission in the event of an investigation.

## AI v Data Protection

Data that is collected and shared amongst like minded operators aiming to raise standards has the potential to be significantly more valuable than when used in isolation. For example, GAMSTOP lets customers put controls in place to restrict their online gambling activities and enables operators to check whether a player has voluntarily registered for the scheme. It is hoped that the introduction of GAMSTOP will improve customer protection standards in online gambling in Great Britain.

However, in order to use personal data for responsible gambling initiatives based on automated decision-making, operators must identify one of six legal grounds under GDPR. Operators must also satisfy further conditions where the use involves 'special categories' of personal data, such as information about a customer's health, which includes information about gambling addiction. Ensuring compliance with data privacy laws has led some operators to resort to excluding elements of personal data from automated decision-making processes, which noticeably undermines the effectiveness of the responsible gambling initiatives. The Information Commissioner's Office (ICO) recognises that applications of AI are "starting to permeate many aspects of our lives" resulting in AI being named as one of their top three strategic priorities and, in March 2018, the ICO invited organisations to provide input on the development of an auditing framework for AI.

At a time when operators are under regulatory pressure to use data to protect consumers, operators should be careful to avoid an inadvertent own goal.



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## Grey market exposure – understanding the risk



The overall regulatory direction of travel continues to place a significant emphasis on the need for operators and suppliers to understand more about the use of their products and services in unregulated jurisdictions where the law is uncertain (so-called “grey” markets), and any associated regulatory risk.

The Commission’s licensing process, which requires applicants to disclose certain information about the jurisdictions from which they derive revenue (on a threshold basis) and their rationale for doing so, is an example of a regulator paying more attention to the derivation of so called “.com” revenues. As of 4 April 2018, existing British-licence holders are also required to notify the Commission, on an ongoing basis, of any sustained growth in their group-wide exposure to unregulated markets. The ability to demonstrate a coherent risk rationale for deriving business from material jurisdictions when questioned is becoming good practice, if not a pre-requisite, for obtaining and maintaining certain regulatory authorisations.

A number of operators/suppliers made their services available in the US prior to the implementation of the Unlawful Internet Gambling Enforcement Act (UIGEA) in October 2006.

Pre-UIGEA exposure to the US may preclude an operator or supplier from being able to participate in any commercial opportunities presented by the regulation of remote gambling in certain states in the US. As is often cited in risk factors in public disclosure documents, this is on the basis that past transgressions of relevant laws deem that operator/supplier unsuitable for licensure (at least in the regulator’s eyes).

This is a clear indication of where past activity could have a detrimental effect on future financial growth in a jurisdiction.

## Ever-changing markets

There are certain markets, such as the Netherlands and Slovakia, which are in the process of regulating (or which have recently passed laws pertaining to) remote gambling and which are contemplating similar “bad actor” type provisions with proposed laws that might preclude an operator from participating in a licensing process. These provisions might address where, for example: (i) an operator’s services were made available in breach of local gambling laws prior to the market regulating; or (ii) where remote gambling services have been made available without the operator paying relevant taxes.

The constantly evolving regulatory environment within jurisdictions from where operators accept business (or may seek to operate) results in significant uncertainty and a consequent need to regularly assess “grey market” exposure, in particular to avoid regulatory scrutiny under existing licences. The Division of Gaming Enforcement in New Jersey has previously issued guidance on its approach to suitability for licensure in the context of gambling activity and made inquiries of “grey” markets, going as far as requiring undertakings in respect of unlicensed gambling in Australia following the enhanced regulatory framework introduced in that country in 2017.

The need for gambling companies to regularly reassess their tolerance of grey market exposure is not only driven by potential regulatory implications but also wider considerations such as other relevant laws/ regulations that may apply (i.e. AML/CTF), or a practical imperative for continuing to trade in certain markets. For example, the derivation of revenue from a jurisdiction in which the law is uncertain, in particular absent a coherent risk rationale, may have adverse consequences for an operator’s or a supplier’s relationship with key stakeholders such as banks, payment processing partners and shareholders.

An important part of constructing a jurisdictional risk rationale therefore is to balance the commercial benefit of deriving revenue from a jurisdiction on an unregulated basis in the short term against the potential detrimental effect this may have on the business as a whole and, in particular, any existing regulatory obligations and future ambitions to operate in regulated and/or newly regulated markets. It is a fine balancing act which not everyone will get right.



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## Time to choose: interact with the customers or your regulator?



In the wake of the reduction in FOBT maximum stakes has come renewed media and political pressure about the sufficiency of existing online gambling regulations, with not infrequent calls for a “radical crackdown” on the commercial freedoms currently enjoyed by the online sector versus their land-based counterparts. Critics emphasise the need to reduce gambling-related harm by calling for greater controls around VIP schemes and insist that affordability checks should no longer be a matter of operator discretion.



The UK government has been clear that more needs to be done to protect consumers online and has, in effect, given the online industry an opportunity to demonstrate why limits on stakes, spend and speed of play analogous to those found in land-based gambling are unnecessary in an environment where information is known about players that can inform and prevent harm being suffered in a more effective way.

And so a central pillar of the Commission's harm prevention strategy is an increased focus on improving methods of identifying harmful play and in piloting how effective interactions with customers can reduce harm. The Commission is due to reinforce its requirements on operators to identify and interact with customers through LCCP changes expected to come into force later in 2019.

The Commission's strategy to improve standards in this area is also being pursued through collaboration with the industry as well as through enforcement-led initiatives. The Commission has engaged in workshops and case work with operators and GambleAware to better understand the challenge of interacting with customers across the industry.

The threat of increasingly punitive regulatory enforcement action against operators who

fail to learn from the lessons of the past remains, and operators should expect that the customer interaction processes will continue to attract scrutiny from the Commission's enforcement team.

However, the Commission is prepared to recognise that many licensees are investing significant time, resource and ingenuity into harm prevention measures. Most major operators have entire teams dedicated to identifying those at risk, and use increasingly sophisticated methods to do so. The Commission acknowledges the great challenge in interpreting the large amount of play and other data available in order to understand a customer's propensity to be a problem gambler. The obligation not only to interact with customers, but also to evaluate the "effectiveness" of doing so remains poorly understood by many industry participants. Operators wishing for guidance in this area would be well advised to review the resources published by GambleAware in October 2018 to support the industry in evaluating methods of interacting with players. That guidance and learnings in this area ought to be followed up by the Commission with a more prescriptive approach to regulating in this notoriously complex area.



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# Loot boxes - the blurred lines between games and gambling



2018 was a significant year for loot boxes. However, regulatory interest in loot boxes and related monetisation techniques suggests that this may only be the beginning.

## What are loot boxes?

Loot boxes (also known as loot crates, prize crates and lock boxes) are a feature of many games. When a player ‘opens’ a loot box, they obtain a random virtual item (or items) for use in the game. This might be an item that will enhance gameplay (such as a weapon or additional character) or a purely cosmetic enhancement (known as a ‘skin’) to a player’s in-game character or virtual item. Different loot boxes are ‘opened’ in different ways. These include virtual currency earned by game play and also real money.

## Do loot boxes constitute gambling?

This is not a straightforward issue, particularly because different loot boxes use different mechanics. The legal analysis therefore varies both by loot box and by country. However, from the perspective of the Commission, the key issue is whether items obtained from a loot box “can be traded or exchanged for money or money’s worth outside [the game]”.

Many other regulators have taken a similar approach. As game publishers do not facilitate any such trading or exchange and expressly prohibit such activity in their terms of service, most regulators have concluded that, in general, loot boxes do not involve gambling. However, regulators have expressed concern about secondary markets where items obtained through loot boxes can be traded.

In September 2018, fifteen gambling regulators from across Europe, as well as the Washington State Gambling Commission, published a joint declaration in which they announced that they

had signed an agreement to “work together to address the risks created by the blurring of lines between gaming and gambling”. A key focus of this is “tackling unlicensed third-party websites offering illegal gambling linked to popular video games”.

A few regulators have taken a tougher approach. In 2018, the Belgian Gaming Commission declared loot boxes to be gambling and the Netherlands Gaming Authority started to enforce regulations under which certain loot boxes were held to be gambling. Publishers have either had to make changes to loot boxes offered to consumers in those countries, or use geoblocking technology to prevent consumers in those countries from accessing certain games.

## The wider issues

Although the main focus of the regulatory interest has been whether or not loot boxes constitute gambling, this is not the only issue. The Commission and some other regulators have expressed concern about the gambling-like mechanics in some games, particularly given the involvement of children. Some in the media have gone further, referring to loot boxes as a ‘gateway drug’ to gambling.

Another significant concern is that of consumer protection, particularly around the disclosure of odds. It is sometimes forgotten that it was this issue rather than gambling that led to the prohibition of ‘gacha’ mechanics in Japan. Some platforms, such as Apple, have introduced a requirement that games offering loot boxes disclose the odds of receiving each type of item to customers prior to purchase. However, in some games these odds are dynamic and vary between players. If consumers feel unfairly treated, either by individual loot box mechanics

or because loot boxes are seen as an undue obstacle to progression in a game, the prospect of regulatory involvement increases. Many publishers therefore keep a close watch for any trends that start to appear in the tickets logged with customer support.

## What does the future hold?

This remains a very live issue. In the US, in November 2018 the Chairman of the Federal Trade Commission (FTC) informed Congress that the FTC would be investigating loot boxes and it is a live issue in several states. In the UK, in December 2018 the Digital, Culture, Media and Sport Committee launched an inquiry to examine, amongst other things, 'digital and gaming addiction' and 'the links between gaming and gambling'.

In the meantime, video games have started to appear on casino floors in Las Vegas, regulated as gambling games, as a way to broaden the appeal of gambling amongst millennials. It seems likely that the boundary between games and gambling will become increasingly difficult to navigate.



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# Post-merger integration: key legal and regulatory issues



The valuation of the business or businesses involved in a trade acquisition or merger usually grabs the headlines. But the real success of a transaction in the gambling sector isn't just down to clever commercial negotiations and will be heavily dependent on a carefully orchestrated integration process to unlock the value of any combination.

In addition to the initial priority of nailing down a modified strategy and ensuring that the right team is in place to deliver it (with the related redundancy and/or incentivisation discussions that entails), some key legal and regulatory issues which need to be handled sensitively are highlighted in this article.

## Relationships with gambling regulators

Gambling regulators don't like big changes in governance structures unless they are part of a strategy aimed at raising standards. On and following the announcement of a deal, it is vital to engage with regulators and deliver a clear plan of changes in senior personnel and an explanation of reporting lines. Regulators want to feel comfortable that there is engagement at the highest level to ensure that a corporate transaction will not affect the commitment of the business to compliance.

## Aligning the position on grey markets

Regulators, banks and lenders are just some of the stakeholders interested in the approach of a gambling company to unregulated revenues. Aligning the approach to .com jurisdictions (including through market closures) can involve tricky decisions and discussions with stakeholders. Ignoring this area can store problems for the future through an incoherent approach to regulatory risk.

## Consistency in compliance policies and procedures

The Commission's licensing conditions, by way of example, impose group-wide obligations on B2C operators in relation to anti-money laundering, responsible gambling and self-exclusion. Although in some areas the Commission recognises the practical difficulties of businesses operating on different platforms, the need for a holistic view of the customer in order to protect the consumer and keep crime out of gambling is paramount in the eyes of most regulators. Accordingly, a programme driving consistency across these areas is vital at an early stage.

## Terms and conditions and privacy policies

The rise of player litigation means that gambling operators need to be wary of inconsistencies in their terms and conditions. Differences in this documentation can be used by unscrupulous customers to exploit particular situations. Furthermore, in the rush to cross-sell brands and products, a combined business can forget to properly examine existing data privacy policies and consents in order to ensure it can safely market to the enlarged customer pool.

## Renegotiating with suppliers

Operational teams will be focussed on finalising a technology roadmap. Synergies can often be driven by seeking to use increased bargaining power opposite the key suppliers of the combined business. This can be fraught with difficulty in terms of destabilising businesses at a critical time and so needs to be handled sensitively.



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# Branded Slots – the benefits and challenges



As anyone who has ever been to Vegas knows, branded slots are an important part of the gambling industry. The sights and sounds of a wide variety of films and TV shows accompany any visitor wandering around the mega casinos of Sin City. And online slots are no different. The big game developers offer a range of branded slots: “NetEnt Rocks” includes Guns n Roses and Jimi Hendrix slots; Playtech’s movie slots feature “Top Gun”, “Superman”, “Justice League” and “Gladiator” among others; Big Time Gaming offers a “Who Wants to be a Millionaire?” slot; and Microgaming has “Jurassic World” and “Dark Knight” slots. The list goes on - Hollywood movies; TV shows old and new; sports stars. There’s a branded slot for everyone.

It’s not hard to see why. Recognisable and, in some cases, much loved brands or celebrities give new slots a ready-built audience; a useful way to stand-out amongst the hundreds of slots now available on any site. Leveraging their brands into gambling can be a lucrative side-line for content owners, but it’s a very different industry to that which they are accustomed. So what are the main considerations for content owners looking to move into the gambling world?

## Choose your partner wisely

An exclusive relationship with one operator may bring great benefits. But game developers, particularly the larger ones, offer an attractive route to a far larger market, with ready distribution across many operators worldwide.

## Remember regulation

A content owner which provides its intellectual property to a games developer likely won’t need to be licensed, for example by obtaining a gambling software licence from the Commission. But if you want to move up the value chain, and start developing games yourself, expect to get licensed, with all the costs and obligations that brings. And that’s before the challenge - and the opportunity - of grey markets.

## Advertising branded slots can be complex

Advertising branded slots is not always as simple as content developers imagine. Advertising gambling is prohibited in Italy; Belgium has banned online casino TV advertising, with a strict framework for advertising casino games online; and Spain is looking at restricting gambling advertising. Even in the UK, traditionally the most liberal market, the Advertising Standards Authority is cracking down on the advertising of slots that could have particular appeal to under-18s.

## Contractual issues to consider

Content owners will want to ensure that use of their IP is “on brand”, so brand guidelines are important. Marketing departments will want approval rights over the ways in which branded slots are marketed. Care will need to be taken with any music included in the branded slot to make sure that all necessary rights are cleared, including from collecting societies. Stars of film and TV may not want their images associated with gambling, particularly those with more “clean-cut” images. A restricted territories list may also be agreed to deal with the availability of the branded slot in certain unregulated markets. And that’s before negotiating the all important fees.

So branded slots can be rewarding - as many content owners, game developers and gambling operators have found - but don’t underestimate the complexities involved.



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# Copyright isn't the only game in town

The 'look and feel' of an online game is an important part of the overall user experience and is something that competitors will often seek to replicate where a game has been particularly successful. Whilst it might be said that 'imitation is the sincerest form of flattery', that does not mean that copycats must be tolerated in all cases, and it is important to have a clear understanding of the intellectual property (IP) rights that may help to protect some of the key 'front-end' aspects of online games,

Copyright often comes to mind first when considering the protection of 'visual' material such as online games. The entirety of a game's graphical user interface (GUI) as well as the individual graphic elements that comprise it may well be protected in copyright, which lasts for a period of the life of the author +70 years.

However, the protection of 'graphic works' has been given a limited scope by the English courts in the context of electronic games. In particular, whilst individual static images produced by a computer program have been deemed protectable as separate copyright works, the visual effect of a number of images displayed one after the other has not. This effectively excludes copyright protection for 'motion' effects in computer games.

## It's (not just) the name of the game

A good, memorable name is a key part of any brand. However, it is important to bear in mind that, in principle, any sign capable of distinguishing goods and services can be protected as registered trade mark. This means that many aspects of a GUI, such as static or moving logos, colours or colour combinations, and other distinctive graphic devices such as icons and characters, are potentially protectable, as are distinctive sounds. Recent changes to EU and UK trade mark law now raise the possibility of the protection of combined audio-visual or 'multimedia' marks, which have gained particular interest in the electronic games sector.

In the UK, unregistered rights under the law of passing off might also help if it can be shown that the use of certain visual elements in a game give rise to an impression that it has been created or offered by a particular operator or supplier, when it has not.

## Designs on your game

Registered designs, available on both a UK national and EU-wide basis, are another possible option for protecting the appearance of a GUI as well as other graphic symbols and images. Unlike trade marks, there is no need

to demonstrate that consumers consider a design to be an indication of trade origin in order to be accepted for registration. Moreover, registered design applications are not examined, which means they can be granted in a matter of days.

Design protection might also offer an answer to the difficulties of enforcing copyright in 'movement' aspects of online games discussed above, because the definition of 'design' under UK and EU registered design law as well as EU unregistered design law does not limit protection to 'static' images only.

Once obtained, a registered design prevents the use of any design which does not produce a 'different overall impression' on an 'informed user' for a period of up to 25 years and there is no need to demonstrate copying for a finding of infringement. Having a design registration ready to deploy in connection with a competitor game that is considered 'too close' can therefore send a powerful message to the market.

All is not lost if a design registration is not obtained as a three-year only 'unregistered' Community (EU) design right (or UK equivalent replacement right following any Brexit) may also be available as a 'back up' option, albeit copying must also be demonstrated in order for infringement to take place.

## Takeaway

Many IP rights overlap and the circumstances in which they may arise and/or be infringed differs. So it is important to have a clear understanding of the full scope of rights available when seeking to take action against copyists.

Operators and suppliers therefore need to think carefully and develop an appropriate IP strategy for their particular online games offering.



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