Regulation

A practical guide to Gambling Commission enforcement action

Legal and compliance practitioners Mishcon De Reya LLP and QEB Hollis Whiteman look at the UKGC's processes when pursuing enforcement action against UK-licensed operators

Contributor | 21 July 2020

The Gambling Commission is a regulator, which has at its core the objective of protecting consumers. The strength of this objective and its determination to satisfy it have become increasingly evident in recent times. We have seen it in the Commission's outreach to consumers, its vocal and regular reminders of the regulations, and its proactive engagement in the review of its own procedures and processes. Significantly, we have also seen it in its enforcement action.

In order to assist those companies that are regulated by the Commission, this article seeks to share our experience as practitioners regarding the Commission's approach to that enforcement action, including in relation to personal licensing and settlement negotiations.

The future direction of enforcement

The Commission has in recent years stepped up its enforcement activity. There are numerous indicators to suggest the Commission will only increase and intensify its enforcement action in the coming months and years. During 2018-2019, the Commission carried out more than 160 regulatory and criminal investigations. Its latest Enforcement Report makes it abundantly clear that this number will only increase. Furthermore, it has recently come under extreme criticism in the House of Commons Public Accounts Committee's report, in which the chair of the Committee called the Gambling Commission a "toothless regulator". The collective experience of the authors of this article is to the contrary – as far as regulators go, the Commission's teeth are plentiful and sharp, and it does not hesitate in baring them. However, this rhetoric in the media will only strengthen the Commission's resolve, in particular in this pandemic climate, in relation to social responsibility failings.

In light of these circumstances, it is imperative that gambling operators carefully review their social responsibility and AML policies. Now is the time to frontload staff with training, to review and audit internal processes, to engage legal and regulatory expertise and ensure actual compliance across the system. A little expense now may save a great deal of expense at a later date.

The Commission's approach to enforcement

The Commission's regulatory proceedings typically begin with compliance assessments and routine enquiries. These may lead to a letter notifying a s.116 licence review, which often requires answers to questions raised, or the provision of information, such as evidence of customers' source of funds, copies of policies, or details of particular structures within the organisation.

Engagement by the regulator often starts earlier than in many other regulated industries and comes with a high expectation of open and cooperative communication. One of the biggest mistakes a licensee can make is to not properly engage from the start. It is vital that companies communicate with the Commission in the right way, with a view at that stage to the worst-case scenario. Companies need to strike the right balance between being compliant and respectful, while maintaining strength and confidence in the company and its processes.

The process can be long and arduous; it can take between several months to – sometimes – years. The first official stage is the Commission's investigation, which results in preliminary findings. The operator then has the opportunity to formally respond. Where an agreement can be reached between the parties, it is possible to put a stop to the process by way of a regulatory settlement, which will include a payment in lieu of a fine.

Where an agreed position cannot be reached, the Commission considers the formal response, further investigates, and writes a settled findings letter. This can either lead directly to a determination of sanction, or, if the scale, complexity or novelty are important to the Commission, to the referral of the matter to a Regulatory Panel. This Panel undertakes a regulatory hearing, determines the position in relation to the alleged failings, and determines the ultimate sanction (although there is always an option of appealing to the First Tier Tribunal).

The Commission is in the process of reviewing its consultation on Regulatory Panel Reforms. As the Commission is a relatively new regulator with comparatively limited experience in holding hearings, we as practitioners welcome this consultation.

Considerations applicable to Personal Management Licences (PMLs)

It is increasingly common for the Commission to review the personal management licences (PMLs) of key management alongside, or shortly after, an operating licence review. The company should consider procuring independent legal advice for PML holders, to avoid conflicts of interest and to ensure they receive appropriate representation.

The company will typically want the operating licence review concluded before the Commission embarks on PML reviews, to maximise the chances of a positive resolution, ideally through a regulatory settlement. However, a PML holder's own position may be compromised by admissions made by the company, in particular because the Commission has a tendency to extrapolate findings agreed by the company into PML reviews. In our experience, the Commission does not adequately consider the separate question of whether the individual has breached the conditions attaching to their PML. The regulator tends to see failings at operator level and assume that the relevant individuals therefore cannot have taken all reasonable steps to ensure compliance.

To date, PML reviews have generally resulted in warnings only. Where more onerous sanctions are threatened, the Commission's approach will come under greater scrutiny.

The Commission's approach to settlement

Agreeing a regulatory settlement is generally seen as a positive means of resolving a licence review, if sanctions are otherwise likely. A settlement does not include the imposition of formal sanctions, and is therefore more palatable, and less challenging to explain to other regulators. However, the inevitable public statement will be not dissimilar to one setting out formal sanctions.

The Commission is open to settlement offers at all stages throughout enforcement proceedings, provided they have been carefully structured and advanced, in line with the statement of principles for determining financial penalties.

The Commission does not appear willing to mediate or negotiate and will expect licensees to show a realistic understanding of their wrongdoing and reflect that understanding in the offer they make. This is exceptionally complex for regulated entities for which this may be the first serious interaction with their regulator, especially where the financial penalties guidance is somewhat opaque and previous cases are unendingly variable and fact-specific. The offer requires thought, tact, and a practical understanding of the Commission's expectations. And the company will need to ensure that it is in line with a well thought through overall approach and strategy to the investigation.

The Commission can be unmoving in order to convey a message, and it can be difficult to manoeuvre where there are, for example, factual disagreements. Companies may find themselves playing a difficult balancing act between on the one hand fighting their corner and attempting to minimise sanction, and on the other hand agreeing terms with the Commission to take steps towards a settlement.

In these circumstances, and at this stage of the Gambling Commission's life, licensees would do well to engage with advisers early to ensure internal processes and procedures are in place, before enforcement strikes. If the worst happens and the Commission does start to make enquiries, licensees need to ensure they adopt the right approach from the start. Experience is that the devotion of time at the outset, combined with expert and practical legal assistance, is likely to avoid the need for far more of both later.

Nick Nocton, Mishcon de Reya LLP

Nick Nocton is a partner in the betting and gaming group at Mishcon de Reya LLP. With nearly 20 years' experience advising the industry, Nocton's practice addresses commercial and regulatory matters, including regulatory investigations and enforcement proceedings, licensing, commercial contracts, IP and IT, data protection, anti-money laundering, dispute resolution and corporate/M&A. He has acted on a number of highly sensitive regulatory enforcement matters opposite the Gambling Commission.

Adam Epstein, Mishcon de Reya LLP

Adam Epstein is head of the contentious regulatory and enforcement practice at Mishcon de Reya LLP. Epstein has defended some of the biggest enforcement cases in the UK, and has real expertise in cases in front of the Gambling Commission. In addition to defending contested actions, his work often takes place in the pre-investigation and pre-enforcement stages, helping clients protect themselves against future possible regulatory action.

Philip Evans, QEB Hollis Whiteman

Philip Evans QC practices from QEB Hollis Whiteman. He has extensive experience representing those involved in regulatory matters arising from gambling.

Kyan Pucks, QEB Hollis Whiteman.

Kyan Pucks is a junior barrister at QEB Hollis Whiteman. She is developing a growing specialism in regulatory matters, including those relating to gambling.

Enforcement | **Mishcon De Reya** | **QEB Hollis Whiteman** | **Regulation** | **UK Gambling Commission**