

PROFESSIONAL REGULATION | GAMBLING | ANALYSIS FOR iGB

THE GAMBLING COMMISSION: CONSIDERATIONS ON BEST PRACTICE

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Introduction

The COVID-19 crisis has brought gambling companies and their regulation under even closer scrutiny, with concerns that people may increase their use of online gambling products in this rather peculiar and unfamiliar time. Neil McArthur, Chief Executive of the Gambling Commission has made it abundantly clear that although the situation is unprecedented and businesses are facing enormous challenges, there will be no leeway from the Commission; on the contrary, the level of scrutiny is likely to increase. This increased intensity and concern particularly for social responsibility is, by way of example, well highlighted by the Betting and Gaming Council's recent announcement that its members had agreed temporarily to cease all gambling advertisement on television and radio.

At a time when many companies may be concerned about possible interactions with the Commission, this article seeks to draw on collective experience of both counsel and solicitors, to explore how best to engage with the Commission throughout any part of the process – whether the investigative stage or indeed regulatory proceedings – to increase the likelihood of a positive interaction, and, ultimately, a positive result.

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In order to do so, this article will explore three specific factors that may assist: setting the right tone, taking part in setting the pace, and calling for assistance. Licensees are also urged to seek legal advice early on in proceedings to ensure a clear and consistent approach is taken throughout.

Setting the right tone

Prior to instigating a notice of review, the Commission is likely to request information from the licensee, which could potentially be about any aspect of the gambling services provided. This first interaction with the Commission is crucial. Although it may appear obvious, it is essential not to underestimate the importance of communicating in the right way and with the right tone: honest and transparent, cooperative, and approachable.

The Commission sets out its expectations in its Statement of Principles for Licensing and Regulation, requiring licensees to be open and cooperative, and to disclose anything the Commission would reasonably expect to know. This is a wide obligation and failure to comply can be very serious. Failure to communicate appropriately will not only irritate the Commission into being more forceful in its approach, but may also result in additional criticism or sanction. A common allegation, tagged onto the end of the Commission's substantive issues, is the lack of open and cooperative engagement by a licensee with the Commission. This would also be an aggravating factor taken into account in the assessment of any sanction, and is very likely to undermine any attempt to reach a regulatory settlement.

Licensees ought to be well aware that the Commission will vigorously pursue lines of investigation that it believes appropriate: such is their right, as the regulator. As such, it is key for licensees to set the right tone with the Commission. This ought not to be confused with any notion of giving in to, and accepting, the demands of the Commission. The purpose of setting the right tone is to show the Commission that matters are being taken seriously, and are dealt with in a mature and transparent way.

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If the right tone and relationship are not set prior to the start of regulatory proceedings, experience shows that it becomes that much more difficult to set them afterwards. This can lead to issues with trust and communication, and can lead to matters becoming more difficult and unmanageable for the licensee. This is particularly so given that the Commission's enforcement team ("Enforcement") is known for its forcefulness. It is not in the licensee's interest to have an unnecessary ramping up of the proceedings.

Unfortunately, once enforcement procedures have begun, it can in some respects be much harder to achieve the desired tone in any proceedings. For example, although the procedure is at pains to state that it complies with natural justice, it is in fact rather sparing in its concern for the licensee's effective engagement in proceedings. The disclosure regime, in which the licensee can ask Enforcement for disclosure of material that may assist its defence, is slender at best, consisting merely of three lines in the Commission's policy statement. Meanwhile, whilst "Agreed Facts" in a hearing can sometimes be a helpful mechanism to narrow issues between parties, our experience has been that Enforcement's practice in relation to them can be fairly uncompromising. Further, Enforcement has a tendency to push the timetable rather quickly. This is particularly problematic as the licensee must be afforded the opportunity to prepare properly for proceedings, as they can have potentially devastating effects if not properly and fairly contested.

Where Enforcement is looking to run matters in a way that could result in an unfair outcome for the licensee, it is even more important for the licensee to maintain the honest, transparent and respectful tone set out above, whilst properly fighting its corner. This will hold a licensee in good stead when addressing the Panel, and will reflect well on the licensee in the event of any appeal.

Taking part in setting the pace

The second factor to consider is the pace of any investigation. The Commission will write, requesting information and setting deadlines. Whilst it is always advisable to meet deadlines where possible, companies must bear in mind that a comprehensive and accurate response is likely ultimately to be more important than a timely one.

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The consequences of rushed responses can be very serious indeed. Rushed responses are often incomplete, inaccurate, and can tend towards the chaotic. Not only will this adversely affect both tone and the perception of ability to comply, it will almost inevitably prolong the investigation. This will increase the time spent as well as increase anxiety and legal spend. Furthermore, companies can be sure that mistakes or omissions will be noted and commented upon in any resulting regulatory proceedings: the Commission has been known to add a separate head of criticism, “incomplete or inaccurate information”, setting out errors and mistakes, and inconsistencies between different accounts at different times. In these circumstances, the fact that a licensee has met a deadline without seeking an extension will count for very little, if anything.

To avoid such a position, it is important that if a deadline cannot realistically be met, the licensee engages in a straightforward, but appropriately forthright, manner with the Commission to set a more realistic timetable.

This is also paramount once regulatory proceedings have begun. Here again, despite a licensee's best motives, the long-term consequences of rushing through the process can be very harmful. This includes where the licensee has undertaken either its own or an external independent review of its procedures, and is making changes to meet the issues raised by the Commission (see further below in relation to expert reports).

Calling for assistance

The Commission has many opportunities to provide its opinion on a licensee's compliance with its regulatory obligations, including in its requests for information, its notices of review, questioning in interviews, preliminary findings and its settled findings.

Instructing lawyers at an early stage, who understand the environment and the issues in play, can help licensees best position themselves in their dealings with the Commission. Further, the work

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that the lawyers do will in the right circumstances be protected by what is known as legal professional privilege. That is, if the right circumstances are created, the lawyers' work can be done confidentially, without fear of it ultimately having to be disclosed, either to the Commission or to any third party in subsequent litigation.

Where a company has understood the Commission's key criticisms laid at its door, it should work with its legal team to ensure compliance as a matter of urgency. In this context, it may wish also to consider seeking other external assistance prior to the start of any regulatory proceedings.

This may take the form of independent experts, who would work directly with internal staff and alongside the legal team to assess the Commission's criticisms: to determine whether the Commission has made any errors in its findings and consider what issues may have led to those errors, as well as to make recommendations to the licensee. Where the Commission's findings are well founded, this puts the licensee in a position to rectify the issues before any meaningful proceedings have commenced. Where they are not well founded, the licensee can be more confident and assertive in its responses to the Commission's allegations. Furthermore, this analysis of why there may be errors in the Commission's findings as to information provided can assist the licensee in addressing those errors.

The licensee may however wish to reflect on a number of considerations prior to bringing in an expert. Bringing in an independent expert requires commitment. It requires transparency on the part of the company, it will take time and it will divert resources. There are also cost implications: not only of the consultants or lawyers undertaking the review, but also of any necessary implementation following the report.

Furthermore, the precise scope of the expert's instructions is paramount. Although instructed by the licensee, the expert must, if it is to add any real value to the process, be independent. As such, the findings and recommendations cannot be edited or manipulated to suit what the licensee is prepared to accept or change: to have any credibility, it must be an "all or nothing" type of report. Although there is no prescribed obligation in the regulatory proceedings to serve such a report on the Commission, its mere existence may make matters somewhat more delicate. As

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such, the licensee may wish to consult its lawyers to determine in advance the scope of the expert's instructions to ensure the report ultimately adds value to the process.

An independent expert report can be a responsible step, and the route to good compliance. It is precisely in these circumstances that the expert's report and involvement in the implementation of any recommendations can go a long way to reassure a regulatory Panel of a licensee's compliance and commitment to compliance.

Conclusion

There are many ways in which a licensee can strategically position itself. This article has sought to explore only three such factors, but the process can be complex and varied and there will be many more. Especially in such strange and unprecedented times, licensees are encouraged to be prepared in their processes, approach and personnel, for intense scrutiny by the Commission.

This article was produced for [iGaming Business](#) by [Adam Epstein](#) of [Mishcon de Reya](#), [Philip Evans QC](#) and [Kyan Pucks](#) of [QEB Hollis Whiteman](#).

This article should not be taken as constituting formal legal advice. To obtain expert legal advice on any particular situation arising from the issues discussed in this note, please contact our clerking team at barristers@qebhw.co.uk. For more information on the expertise of our specialist barristers in criminal and regulatory law please see our website at <https://www.qebholliswhiteman.co.uk/>.

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