

Practice Group BRIEFING NOTE

TITLE: *The Personal Management Licence regime: An impossible tightrope?*

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Introduction

Personal management licences (“PMLs”) issued by the Gambling Commission of Great Britain (“GBGC”) are held by those occupying specified management roles at licensed gambling operators. They are the key individuals at operators responsible for overall strategy, finance, marketing, information technology, oversight of day-to-day management of certain premises, regulatory compliance, and anti-money laundering.

The PML licensing regime for these senior managers creates a personal responsibility for regulatory compliance, both in the way that they conduct themselves in their role, and the way in which they have management responsibility for the behaviour of the operator for whom they work.

Their jobs are rarely easy. On top of the stresses and pressures of working for licensed gambling operators in a fiendishly competitive market, they must also navigate an ever-evolving regulatory landscape. In addition, the GBGC has been signalling for the past few years that it will increasingly focus on the role played by PML holders when undertaking compliance and enforcement investigations into operators.

The statistics reflect this; in the period April 2019 – March 2020, 49 separate licence reviews were undertaken into PMLs, primarily due to safer gambling or anti-money laundering (“AML”) failures identified at the operator at which they were employed. We expect that figure to increase by the

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time of the publication of the GBGC's next annual Enforcement Report for 2020-21 later this year. Recently published GBGC action taken includes:

- The CEO of an operator receiving a warning and an additional licence condition due to safer gambling and AML failures identified at the operator.
- 12 PML holders at an operator receiving warnings, advice to conduct letters, or surrendering their licence following notification that their licence was under review, due to safer gambling and AML failures identified at the operator.
- A further 19 PML holders at that same operator surrendering their licence or receiving advice to conduct letters outside of the licence review process due to safer gambling and AML failures identified at the operator.

Prefacing the GBGC's last Enforcement Report, then CEO Neil McArthur wrote that "holding an operating or a personal licence is a privilege, not a right". He went on to say that the GBGC had indicated in the summer of 2017 that its focus was shifting towards PML holders and that "those in boardrooms and senior positions need to live up to their responsibilities and we will continue to hold people to account for failings they knew, or ought to have known about".

Is personal regulatory liability within a management framework straightforward?

The GBGC's position seems, on the face of it, a reasonable one. Who else, other than their senior management and PML holders, are responsible for the behaviour of operators? It therefore follows that where PML holders have failed to meet the GBGC's standards and/or to adhere to their responsibilities, they should be held to account.

However, as is frequently the case when seeking to apportion blame for a mistake, matters are often more complicated than they may seem. Factors of note include:

- The GBGC's regulatory framework evolves constantly.
- The GBGC's regulatory framework and guidance is often said to be difficult to follow and poorly communicated.

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- Employees who are not PMLs may be responsible for mistakes and oversights. Whilst these mistakes may expose the operator and its PMLs to criticism, it does not always follow that they are due to a PML's ignorance or incompetence, and thus holding them responsible for shortcomings on a strict liability basis may not be fair or reasonable.
- PML holders are subject to a licence condition that they take "all reasonable steps to ensure the way in which they carry out their responsibilities in relation to licensed activities does not place the holder of the operating licence ... in breach of their licence conditions." It does not always follow that, because an operator is in breach of licence conditions, a PML holder will also be in breach personally. In many cases, a PML holder may have taken "all reasonable steps".
- Inevitably, operators and PML holders' views will not always be aligned. PML holders, who in our experience are generally trying to do the right thing, often find themselves facing complex challenges and caught between the GBGC's requirements and the operator's commercial interests, with their personal livelihood and reputation at risk. This should be borne in mind by the GBGC, particularly in the current economic climate.
- PML licence reviews are not always carried out by the GBGC in a consistent manner. In some cases they are commenced at the same time as, or during, an operating licence review, but more often than not they are commenced once an operating licence review has concluded. Licence reviews can take years rather than months to reach a conclusion. PML holders are therefore left in the unenviable position of having to recall events that have taken place years ago when trying to defend themselves. This is if they are lucky enough to have access to the information required in order to aid their recall. If, for any reason, they have left the business, this may not be possible.
- The GBGC does not set out clearly its approach to PML reviews when they are linked to operating licence reviews. PML holders are often expected by the GBGC to disclose information or answer questions about matters relating to an operating licence review that may have an impact on their PML, without having been clearly informed of the risks or consequences of doing so. The fact that in some cases a PML holder may be accused of breaching a licence condition, which is a criminal offence under the Gambling Act 2005, increases further the exposure to personal risk. This is despite the GBGC's policy position that, as a general rule, it will not pursue a criminal investigation into a licensee, as in most cases the matter is likely to be capable of being dealt with by exercise of its regulatory powers.

In an age where mental health is at the forefront, all would benefit from giving thought to the impact regulatory action may have on the mental health of PMLs, the vast majority of whom are well-intentioned and want to do right by both their operator and their regulator. Competing interests, reputational harm, the unintentional consequences of their actions and future

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employability are all factors that will weigh heavily on the shoulders of a PML holder subjected to regulatory action. Expedited investigations should be prioritised, processes and procedures clearly outlined, and legal rights clearly communicated.

PML reviews that take years to resolve, often following prolonged operating licence reviews, are of no benefit to the GBGC, nor to the individual concerned. Swift reviews and clear processes will not only serve to limit the impact on the individual concerned but may also improve the efficacy of regulation.

A PML under review: some things to think about

GBGC investigations and licence reviews of operators often expose PML holders to the risk of similar action in a personal capacity. This puts PML holders in the invidious position of not only responding for and on behalf of the operator, but also having to consider their own professional interests and reputation.

We suggest five things a PML should consider in this situation.

First and foremost, when a PML holder learns that the GBGC is investigating a matter relating to either their own or their operator's licence, they should seek appropriate legal advice and support immediately.

Before commencing a licence review the GBGC is obliged to put an operator or PML on notice, but a PML may become aware of GBGC interest from an early stage, for example through enforcement enquiries. If so, advice should be obtained at this point. This is important because often the interests of the PML do not necessarily align with those of the operator, even if they act very much as part of the "controlling mind" of the operator, and interests seem at the time to be indivisible.

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Secondly, PML holders should be mindful of their own position when saying anything on the record to the GBGC. This is not to say that they should be anything other than honest, open and transparent: it is merely about ensuring that the process is fair to them too.

A typical step in the review of an operator's licence will be a preliminary meeting with senior management. In some cases, this may be followed or replaced by a regulatory interview (sometimes under caution). These meetings and interviews are usually recorded and transcribed by the GBGC. Anything that is said in them may be used in both the investigation into the operator, and also in any subsequent review of the PML holder.

In practice, PMLs themselves should be warned, or in some cases cautioned, in an individual capacity if they themselves might be investigated. Appropriate advice can help PMLs navigate the difficult situation in which they have to respond on the record on behalf of an operator, whilst ensuring their own position is also protected.

Thirdly, if unsure of timescales and/or the review process, PMLs should ask the GBGC to clarify its position. Whilst the GBGC may not always be able to provide a definitive answer, the fact that the request has been made is an important point of record.

Fourthly, if, after an operating licence review has concluded, perhaps with a number of failings identified and regulatory action taken, the PML is unfortunate enough to be notified that their PML is being reviewed as a consequence of their role in the identified concerns, it is vitally important that they are given fair and proper disclosure. Without it they will find it very difficult to understand the case against them, and properly defend themselves. This can become more complicated if the PML no longer works at the operator concerned.

We recommend that the PML do all they can to seek disclosure from the GBGC and the operator in relation to the matter concerned. What material is the GBGC relying upon? What representations did the operator make? Should the GBGC or the operator be reluctant to hand over material relevant to them, there are options open to them to challenge this.

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And finally, a PML should always be open and honest with the GBGC, and remember that they also have a personal duty to uphold the licensing objectives and act with integrity in the review process. Any obfuscation will do them no favours in the long term.

Conclusion

PML holders who make genuine mistakes when trying to do the right thing, particularly those in compliance roles, should in appropriate cases be supported by the GBGC and viewed as people who can assist in raising standards. Prioritising support and guidance over targeted regulatory action when such mistakes occur may be more productive and is less likely to deter highly competent individuals from holding PMLs because of the risks associated with doing so.

Whilst competing commercial and regulatory interests mean that being a PML is becoming tougher, there are things that PML holders can do to help themselves, and to protect their interests when the GBGC become involved. Legal advice should be sought at an early stage.

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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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