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The GB Gambling Commission's enforcement strategy: changes and implications for industry

Following its consultation which ran from January until April 2017, the GB Gambling Commission ('Commission') has this summer implemented its revised enforcement regime. This carries some major changes, such as around the presumption of settlements. Here, Andrew Tait and Andrew Cotton of Gordon Dadds analyse the important changes and also the implications for operators, drawing upon the lessons learnt from recent Commission enforcement action such as that involving BGO and Lottoland.

The old regime

The UK licensed gambling industry has probably had it too good for too long and never even realised. The Commission's revised enforcement regime was implemented in July 2017, as part of the Commission's well-publicised drive to raise standards and put the interests of consumers first. In its consultation on the proposed amendments to its enforcement strategy the Commission made it clear that it wished to remove the bias in favour of voluntary settlements rather than undertaking formal licence reviews.

Under the Commission's previous enforcement strategy voluntary settlements had become the standard approach, with the formal licence review process only being initiated in the most extreme cases. In the consultation paper¹ the Commission stated that experience shows that "whilst settlements are an effective way of improving compliance, in practice, the process of arriving at these has been too drawn out." Voluntary settlements required the operator to surrender the profits made from non-compliance and agree to the publication of a public statement setting out the detail of the failings and the Commission's findings. The Commission concluded that the settlements had insufficient deterrent value, as they only removed the operator's commercial gain from the compliance failings, together with payment of the Commission's costs of the investigation.

This absence of a 'big deterrent' had become apparent in the string of voluntary settlements arising from anti-

money laundering ('AML') and social responsibility failings. There have been nine of these since 2013 with many of the major gambling operators falling short of the expected standards for AML and Social Responsibility controls and procedures. The detailed failings and findings were published together with warnings that all other operators must learn from the mistakes of others; however, the same failings and mistakes were made by other operators.

Coral Racing, Bet365, Rank, Paddy Power, Silverbond and Betfred were all found to have insufficient internal AML reporting and escalation systems in place across their multiple outlets, products and platforms, and in several cases the operators had failed to detect the customer's criminal spend at an early stage through their social responsibility controls.

There were very few financial penalties levied under the old regime but that is now all set to change in a big way and in fact is already evident with the recent enforcement action taken against BGO Entertainment Limited² and EU Lotto Limited³ under the new regime.

The changes

Changes were brought in on the back of the consultation process, which started in January 2017 and concluded four months later. The industry's concerns were raised during that process and focused around the Commission stepping beyond their regulatory remit and creating an unfair bias in favour of an increasingly savvy customer base, who at times abuse

bonuses and complaints systems, putting the operator at an unfair disadvantage.

However the Commission, in its response document⁴, confirmed that it saw this new approach as a way to redress the balance of power and give consumers a voice and protection whilst at the same time acting in a fair and balanced way. The Commission issued a revised Statement of Principles for Licensing and Regulation⁵ and a new Licensing Compliance and Enforcement Policy Statement⁶ in June 2017.

Major change number one: the presumption of settlements has now gone

There is now no bias in favour of voluntary settlement (now referred to as a regulatory settlement) but instead all forms of regulatory enforcement are put on an equal footing, where following a licence (operator and/or personal management) review, the following may be the outcome:

Under S116 (1) & (2) of the 2005 Gambling Act (Act):

- Take no further action;
- Advice on how licensee should conduct themselves.

Under S117 of the Act to:

- Give licensees a warning;
- Add, remove or amend a condition to the licence;
- Suspend a licence;
- Revoke a licence;
- Impose a financial penalty.

Where any one or more of the S117 measures may be imposed.

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There is no real change in the review procedure itself, which can run in parallel with or instead of a regulatory settlement. A regulatory settlement usually needs to be instigated by the operator or personal management holder at any stage in a licence review but will most likely be encouraged by the Commission if it feels that this is the more appropriate route to take. The GC will not defer to a regulatory settlement if the breach is so serious as to warrant criminal or regulatory enforcement.

The first step in the licence review process is for the Commission to issue a written notice to the licensee setting out the details of the breach and inviting it to a preliminary meeting. Following a fact finding process and this preliminary meeting, the Commission will issue a preliminary findings letter, which will include its preliminary assessment.

It is at this stage where the decision to go down the regulatory settlement route may crystallise. There have to date been two cases where the principles of the new enforcement strategy have been applied, namely the BGO and Lottoland cases.

In the case of BGO the regulatory settlement route was not followed, and one can surmise that this was due to repeated failings by BGO to abide by the warnings given by the Commission, dating back to June 2015, to address BGO's failure to comply with marketing and advertising Social Responsibility Code 5.1.7 and Social Responsibility Code 1.1.2. (responsibility for third parties), together with BGO's inaccurate statements to the Commission that it had achieved compliance when in fact the opposite was true.

The case of Lottoland also stemmed from breach of the same two Social Responsibility Codes but Lottoland had in the past following warnings from the Commission and made changes to make their advertising more transparent, and in this instance was cooperative and agreed with the seriousness of the failure to comply with the Commission's Social Responsibility requirements. This led to a regulatory settlement route being followed rather than a financial penalty and a formal warning under S17 of the Act as in the BGO case. Following the preliminary findings letter the licensee has about 28 days to make

representations (written or oral) to the Commission. After that the Commission will make a final decision in those cases where a financial penalty is to be imposed. The licensee is offered the option to appeal to the Commission's Regulatory Panel for final determination.

The Commission has the power, under S28 of the Act, to instigate a criminal investigation where it is suspected that an offence under the Gambling Act has been committed. Such instances may be a personal management licensee cheating under S42 of the Act, the provision of illegal gambling facilities or providing false or misleading information to the Commission or a Licensing Authority under S342 of the Act. Finally operators or any individuals employed by them who are complicit in money laundering offences will be taken down the criminal route.

Major change number two: higher financial penalties

The Commission will impose higher financial penalties for breaches, especially where these are systemic and persistent. Out of the 11 drafting changes consulted on, eight relate to financial penalties.

The Commission has purposively not provided a formula for the calculation of penalties or discounts to ensure its own complete discretion and to prevent licensees calculating in advance their prospective penalties to factor that into their decision making.

Financial penalties will consist of two parts, with the first taking account of the detriment suffered by consumers and/or removal of any financial gain and the second a penal element linked to the seriousness of the breach.

The increase in the level of the financial penalty will be linked to the penal element only. The Commission's discretion in this respect will depend on a total of 17 factors as set out in Paragraph 2.8 of their Statement of Principles for determining Financial Penalties⁷. However out of those, there are six Key Considerations, where two are linked to repeated failings by the licensee itself or by other licensees as publicised by the Commission. Therefore it is essential that licensees not only heed warnings issued by the Commission, as for example

in the BGO case, but also monitor the Commission's publications and advice, in order to analyse and learn from the failings of other operators.

This may explain the difference between the BGO fine of £300,000 versus Lottoland's fine of £150,000 for the same Social Responsibility Code breaches.

Major change number three: discounts

Discounts will only be applied to the penal element of a financial penalty, and the earlier that disclosure of all material facts and admissions are made during the investigation the more credit will be given to the licensee. This will then be applied against the financial penalty or payment in lieu of this if a regulatory settlement is made.

In the case of BGO there were multiple instances of marketing and advertising breaches, whereas in the Lottoland case there was only one customer complaint and one instance of non-compliant affiliate marketing. Therefore the detriment to the consumer and financial gain to BGO would have been much greater than in the case of Lottoland. Coupled with the lack of cooperation and repeated failings by BGO the penal element will have increased the overall financial penalty, making a discount unlikely. The mere fact that Lottoland offered the regulatory settlement route should have entitled them to a discount.

The implications

The warnings are clear - learn from your own or others' past mistakes or suffer the consequences. Licensees will need to be proactive and continually review published findings by not only the Commission but also other relevant bodies such as the Advertising Standards Authority ('ASA') and Competition and Markets Authority ('CMA').

First early target: consumer protection

On 23 June 2017 the CMA and the Commission issued a joint update⁸ on the CMA's investigation into the gambling industry's unfair consumer practices. Several operators are under investigation for breach of consumer protection law and will as a result face enforcement action by both the CMA and the Commission. The CMA's civil enforcement powers centre around the use of court orders to compel defendants to take remedial action. However any

company officer responsible for the failure may also be required to meet the costs of the CMA's court applications.

The CMA investigation started in October 2016, and, following the June 2017 update the next one will be in December 2017. There will be no doubt be enforcement action initiated by the Commission, which is likely to be publicised in the second half of this year and will focus on such anti-consumer practices as:

- Non transparency around sign up bonuses;
- Restrictions on the ability to withdraw, such as: preventing the withdrawal of relatively small amounts at any one time; overly extensive timeframes; excessive wagering requirements; or requirements to produce unnecessary documentation;
- Potentially unfair rules that restrict certain play strategies, on which operators rely to deny customers a pay out when they come to claim their winnings;
- Requirements for players to take part in publicity or advertising activity for an operator before the player can withdraw their winnings;
- Unfair dormant fund charges with the ability to cut the total player balance after just token attempts at trying to contact the player, regardless of the size of the balance.

Second early target: money laundering

1. <http://www.gamblingcommission.gov.uk/PDF/consultations/Changes-to-our-enforcement-strategy-consultation.pdf>
2. <http://www.gamblingcommission.gov.uk/PDF/BGO-decision-notice.pdf>
3. <http://www.gamblingcommission.gov.uk/PDF/Lottoland-public-statement-June-2017.pdf>
4. <http://www.gamblingcommission.gov.uk/PDF/Enforcement-strategy-consultation-responses-June-2017.pdf>
5. [As mentioned above there have been nine cases of publicised AML failures. In the Key Considerations Paragraph 1.6 of its financial penalty document, the Commission has made clear that it will have particular regard to:](http://www.gamblingcommission.gov.uk/PDF/Statement-

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“Whether the breach arose in circumstances that were similar to previous cases the Commission has dealt with which resulted in the publication of lessons to be learnt by the wider industry.”

In June 2017 at a remote sector industry workshop the Commission announced that it would be conducting a thematic AML review and reminded the industry of Licence Condition 12, introduced in October 2016 and which requires all operators to conduct an AML Risk Assessment of its business on at least an annual basis. If as a result of this thematic review (where a sample set of operators will be reviewed in terms of AML Risk Assessment and corresponding AML Policies), there is seen to be a significant lack of compliance in this area, then this will no doubt be a second target area for enforcement action.

The Commission will itself be assessed by the Financial Action Task Force ('FATF') as the supervisory authority for the gambling industry in 2018, and so will need to demonstrate that it is adequately enforcing AML compliance in the gambling industry.

Third early target: group revenue reporting

Licensees will need to report actual revenues across their group of companies from April 2018 under a proposed change to Licence Condition 15.2.2. The Commission's intention is to stop grey market revenues giving an unfair advantage in the British market and to address ongoing suitability issues. Given the great reluctance of some gambling companies to potentially incriminate themselves in disclosing wider group revenues, licensees may renege on this obligation, thereby breaching the Licence Condition and exposing themselves to regulatory or even criminal enforcement action.

Conclusion

The implications of this new enforcement strategy remain to be seen but given the early BGO and Lottoland cases, we will no doubt see a higher volume and greater level of regulatory enforcement. It will be up to licensees to decide if they capitulate by means of regulatory settlement or fight through the appeal process.

Though the signs do not look good, as Lottoland can testify, with a single complaint (with minimal damage done) and full cooperation with the Commission investigation still leading to a £150,000 payment and the embarrassment of a public admission.

[of-principles-for-licensing-and-regulation.pdf](#)

6. <http://www.gamblingcommission.gov.uk/PDF/Licensing-compliance-and-enforcement-policy-statement.pdf>
7. <http://www.gamblingcommission.gov.uk/PDF/Statement-of-principles-for-determining-financial-penalties.pdf>
8. <http://www.gamblingcommission.gov.uk/news-action-and-statistics/news/2017/Gambling-operators-face-landmark-enforcement-action-over-unfair-practices-and-promotions.aspx>