

GOLDBLOCKS AND THE THREE LICENSING OBJECTIVES



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Everyone is familiar with the tale of Goldilocks, who upon entering the house of the three bears seeks to find a bowl of porridge, a chair and a bed that is “just right”, not too hot and not too cold, not too soft and not too hard. In many ways the British Gambling Commission faces much the same dilemma, they too must find the “just right” approach to each of the three licensing objectives (in summary, preventing gambling from being associated with crime, protecting children and vulnerable people from being harmed by gambling and ensuring gambling is fair and open). Regulation that is “too soft” allows regulated entities to fail to reach the required standards, but regulation that is “too hard” risks driving business into an unregulated black market.

There is no denying that the Commission’s approach over the past few years has become “harder”, resulting in an increasing number of investigations and licence reviews. An unprecedented level of regulatory action by the Commission over the past 12 months has led to a total of around £24m in financial penalties being paid by gambling operators. Whether they have been the subject of enforcement action, an investigation or a routine compliance assessment, licensed operators will certainly be feeling the effects of an increased regulatory burden.

Despite this, Tom Watson MP, Deputy Leader of the Labour Party, believes that we “have inadequate regulation” (debate in the House of Commons on Problem Gambling, 2 July 2019) and, in a speech to the Demos think tank on 18 June 2019, called for the creation of a gambling ombudsman, asking of the current

system “where is the framework of consumer protection?”. So, with accusations of being both “too hard” and “too soft”, has the Commission in fact got things “just right”?

Penalties

Operators may understandably be wondering what use has been made of the £24+m paid in penalties in the last year. Just over half of this amount represents fines imposed by the Commission (these go into the Consolidated Fund – essentially the Government’s bank account), around £9m went to GambleAware, “accelerating delivery of the National Strategy to Reduce Gambling Harms” or more generally a “gambling harm related charity”, and around £2.4m was repaid to victims of crime. It certainly seems fair to say that the level of fines has generally increased, with seven figure sums being far more common than they had been in the past, and penalties as high as £7m should certainly make operators sit up and take notice.

The Commission launched the new “National Strategy to Reduce Gambling Harms” in April this year. Teasing out how the funds given to accelerating delivery of this Strategy this will actually be spent is challenging, as the Strategy’s “implementation plan” has yet to be published. It appears from statements such as “The aim is to make significant progress towards an effectively commissioned, comprehensive national treatment and support offer that meets the needs of current and future service users” that some of the money will go towards increasing the availability of treatment and support services, such as the helpline provided by GambleAware, although the strategy document notes that “waiting lists for access to these services are relatively short”. It would be fair to operators paying significant sums to support the Strategy to receive more specific information about what the money will be used for; hopefully this information will be forthcoming soon.

To put these amounts into context, however, using figures put forward in the recent Problem Gambling debate in the House of Commons, the gambling industry generates around £14.5bn in GGY per year and £3bn in tax revenue. The annual cost to the economy of gambling addiction is estimated at £1.2bn. It may well be fair to expect the costs of gambling addiction to be met by the industry, in which case its tax payments more than cover it. But if the gambling industry is supposed to cover the costs of gambling addiction in addition to the tax revenues, the revenue from fines, financial settlements and voluntary donations comes nowhere close.

Enforcement themes

With so much on the line, what can be done to minimise the risk of enforcement action if you are an operator? A good strategy is to understand the failings made by your peers and look to make sure your own policies and procedures don’t leave you open to the same charge.

The public statements published by the Commission show similar recurring issues. One of the main themes is failings in enhanced due diligence, which often become apparent following customers spending significant sums of money which



turn out to be stolen or obtained through fraud. Often, enquiries have been made about the customer’s overall wealth, but no evidence has been obtained of the source of the actual funds received by the operator. Another common theme is that the operator failed to interact with a customer either early enough, properly, or at all. As demonstrated by the past years’ enforcement action, customers are sometimes able to spend significant sums of money before any enquiries are made to assess the legitimate origin of the funds and/or whether the customer may demonstrate problem gambling behaviour.

An emerging theme is that of “affordability”. Increasingly operators are being expected to consider whether a customer’s level of gambling is affordable for them and, in its recent Enforcement Report, the Commission has been more specific about what this should involve.

Source of Funds enquiries

In the recent case of Platinum Gaming Limited (aka Kindred and Unibet), a customer lost a total sum of around £620,000 in a 21 day period in October 2017. The customer had been flagged as a high-risk player when he first played at a significantly lower level in February 2017, however the Commission say the operator did not make “adequate enquiries” about the source of funds (“SOF”) he was using to gamble. After 18 days of play in October the operator made source of wealth (“SOW”) enquiries and once it received a completed SOW questionnaire from the client it requested SOF information. The customer did not provide this which led to the account being closed, however



by this time the customer had spent £620,000 of what turned out to be fraudulently obtained money. If the operator had requested SOF information in the first few days after the customer returned in October, it is likely that the account would have been closed before such large sums were spent.

The Commission has always been reluctant to specify an exact figure which should trigger a requirement for SOF evidence, perhaps fearing that it would lead to a “race to the bottom”, with enquiries being carried out unless and until that figure was hit. However, the fact that a large proportion of enforcement action relates to customers, frequently those suffering from a gambling addiction, spending six figure sums which turn out to be stolen, indicates that the current regulatory approach is not “just right”.

A step towards the Commission being more specific as to what is required was made in the recent case of Casino 36 Limited. As part of a regulatory settlement with the operator, the Commission imposed new licence conditions, including that the licensee must carry out, on an annual basis, enhanced due diligence on its top 125 customers by drop and top 125 customers by loss. The licensee also agreed to instruct independent auditors to carry out a review of the current top 100 customers in respect of their SOW and SOF and report back to the Commission on the results.

Customer interaction

The Commission has recently carried out a public consultation on customer interaction. It proposes to introduce a new licence

condition which states that:

“Licensees must interact with customers in a way which minimises the risk of customers experiencing harms associated with gambling. This must include:

1. *identifying customers who may be at risk of experiencing harms associated with gambling.*
2. *interacting with customers who may be at risk of experiencing harms associated with gambling.*
3. *understanding the impact of the interaction on the customer, and the effectiveness of the Licensee’s approach.”*

Without wishing to downplay the importance of carrying out interactions with at-risk customers, in my view, the proposals go too far. Perhaps unintentionally, the proposed wording of the new licence condition seems to impose a strict liability on operators to identify and interact with all customers who may be at risk of experiencing harm. A failure to identify one at-risk customer, to interact with them and/or to understand the impact of the interaction on them, would potentially be a licence breach.

The proposed condition confuses the desired outcome (customers who are at risk are identified and subject to an effective interaction) with the required behaviour of licensees. The latter is the appropriate subject for licence conditions. The Commission should require operators to implement policies and procedures which maximise their chances of identifying at-risk customers, but cannot require them to actually identify every such customer.

The outcome of the consultation and final wording of the new licence condition is still awaited.

Affordability

A further theme of recent Gambling Commission commentary has been the issue of “affordability”. On the one hand, it is clear that if an individual’s gambling is not “affordable” for them, there is a risk that they are suffering from problem gambling and/or turning to criminal activities to fund their gambling. On the other hand, “affordability” is very difficult to measure or estimate and, perhaps more importantly, gambling operators are put in the difficult position of dictating to a customer on what they should or should not spend their income or savings. Certainly, for higher value or “VIP” customers, affordability has always been considered, perhaps indirectly, under EDD procedures. If EDD on a customer spending £10,000 per month reveals that they have personal wealth in the hundreds of millions, it would be reasonable to allow them to continue gambling because (in the absence of other indicators) the risk this spend level is indicative of problem gambling or criminal activity is low, in other words, they can easily afford this level of gambling activity.

The Enforcement Report, however, focuses on the average person in its section on affordability. The Commission gives data from a YouGov survey which asked participants how much “discretionary income” they had to spend each month. The Commission concluded that the reasonable range of disposable

income was between £125 and £499 for much of the population. The Commission states that “the above disposable income data identifies clear benchmarks that should drive Social Responsibility (SR) triggers”.

I’ve replicated the data published by the Commission below because there is some mysterious missing data: one would expect the total percentages for each age range to add up to 100%, because they ranged from £0 to £1,500+ and should therefore encompass every possible disposable income. But, for example in the 18-24 age range, only 74% of the population are represented. Even if 26% answered an unshown option “don’t know”, the accuracy of this data has to be questioned. No link is given to the survey results to enable operators to use the source data to form an evidence-based view on affordability for their own target market.

Monthly personal disposable income

Age	Nothing	Less than £125	£125 - £249	£250 - £499	£500 - £749	£750 - £999	£1,000 - £1,249	£1,250 - £1,499	£1,500 +
18-24	7%	24%	15%	13%	6%	4%	2%	1%	2%
25-34	6%	18%	18%	19%	10%	6%	4%	2%	3%
35-44	7%	21%	17%	17%	9%	5%	4%	2%	3%
45-54	9%	23%	16%	16%	8%	4%	3%	1%	3%
55+	6%	21%	16%	14%	7%	4%	3%	1%	4%

Source: Raising Standards for Consumers: Enforcement report 208/19, Gambling Commission

Concerns about the YouGov data aside, the Commission is implying that, in the absence of documentary evidence of the disposable income of their actual customer base, operators should be assessing affordability for those customers whose spend exceeds that which would be realistic for someone with an average amount of disposable income. In the Enforcement Report the Commission recommends that operators “consider their customer base and their disposable income levels as a starting point for deciding benchmark triggers” and “if an operator is going to set specific triggers for a customer base not representative of the general public, various documents sources should be relied upon, but they must contain sufficient information to substantiate the trigger level set.”

The Commission does not set out how the affordability assessment should be done, but it would presumably need to go further than an assessment of the customer’s income. An individual with an annual income of, say, £50,000 could have a monthly discretionary spend ranging from nothing (for example if they are the sole earner for a family of five), through £3,000 (for example if they live at home with no expenses other than tax), or higher (for example if they have considerable inherited wealth). Gathering more detailed information than a customer’s annual income will inevitably be a complex process and it must be questioned whether it would be proportionate to carry out such an investigation on all customers spending the suggested figure of £125-499 per month.

What should be done based on the affordability assessment is also not the subject of any recommendations. A communication from a gambling operator to the effect that “we’ve done some digging and decided that you’re spending too

much on gambling as compared to what we’ve found out about your annual income” is quite likely to be unwelcome. As ever, there is a need to balance individual freedom to spend money on gambling as a legitimate leisure activity with the need to protect the public from the dangers of problem gambling and gambling using stolen funds.

Whilst there are obvious difficulties in assessing affordability and then acting on that information, there may be commercial benefits to doing so. As long as a customer is gambling in way that is affordable for them, they are likely to continue to be a good customer on a long-term basis. Whilst (subject to concerns about the accuracy of the figures) it is helpful that the Commission has given some guidance here as to when checks should be carried out, it ought to clarify what those checks would entail and what operators should do based on the results.

“Just right”?

The story of Goldilocks ends with the little girl waking up to find the three bears looking down at her, whereupon she jumps out of Baby Bear’s bed and runs away into the forest. It was never made clear in any version of the story I read whether she suddenly felt remorse for her actions and saw the error of her ways, or was just running away to find another house to cause havoc in. The comparison between Goldilocks and the Gambling Commission breaks down a little here, but it does raise a pertinent question: to the extent that gambling operators are under increased scrutiny by the Commission, will it lead to better customer outcomes, or just more uncertainty for operators?

I would suggest that action taken out of fear of enforcement action is unlikely to be as effective as changes made out of a genuine understanding of the risks and potential harms to the business. The approach to regulation that I would like to see is therefore not “harder” or “softer” but “more collaborative”. Rather than just specifying the ultimate outcome to be achieved (for example at-risk customers being identified or customers gambling in a way that is affordable) and highlighting cases where that outcome is not met, the Commission could better promote the three licensing objectives by guiding licensees to what acceptable procedures would be. :: CGi

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Melanie Ellis is a partner at Northridge Law LLP, with 13 years’ experience as a gambling regulatory lawyer. Melanie advises on all aspects of gambling law including licence applications, compliance, advertising, licence reviews and changes of control. She has acted for a wide range of gambling operators including major online and land-based bookmakers and casinos, B2B game and software suppliers and start-ups. She also frequently advises operators of prize competitions and social gaming products. Melanie has a particular interest in the use of new technology for gambling products and novel product ideas.