

GREY MARKETS AND SUITABILITY UNDER SCRUTINY

Changes to Gambling Commission requirements put licensees under pressure to disclose all of their foreign revenues, including from ‘related’ companies.

Bahar Alaeddini of Harris Hagan says this will prevent operators from “funneling” their foreign activities.

All Gambling Commission licensees will unanimously agree that the requirements of being licensed in Great Britain have dramatically increased in recent years. One of the latest changes came on 18 May, 2017 with the publication of the second part of the Commission’s regulatory data consultation response document. The response sets out the Commission’s proposals to change some parts of the regulatory data that licensees are required to provide to the Commission. The main focus was on the regulatory returns that all licensees have to submit on either a quarterly or annual basis. One of the biggest changes in the response is the Commission’s plan to:

- remove the foreign jurisdiction section of the regulatory returns form from April 2018; and
- add a new licence conditions and codes of practice (LCCP) key event requiring licensees to report group jurisdictional revenue (date to be confirmed).

Policy

One of the licensing objectives underpinning the regulation of gambling includes “preventing gambling from being a source of crime or disorder, being associated with crime or disorder or being used to support crime”. The statement of principles for licensing and

regulation states that the Commission will achieve this by ensuring that:

- only suitable applicants will be granted licences;
- the suitability of licensees will be assessed on an ongoing basis as part of the Commission’s compliance activities;
- compliance activity is targeted where the risks to the licensing objectives are greatest; and
- the suitability of licensees will be reconsidered in light of any subsequent criminal activity or connection with such activity.

The same document goes on say: “[The] Commission expects operators to comply with the law, both in the UK and in other jurisdictions in which they, or related companies, operate. Failure to meet this expectation may raise questions about the continuing suitability of licence holders”.

Unhelpfully, “related company” has never been defined by the Commission. Arguably, it could include companies outside a group with the same ultimate beneficial owners or same brand.

Jurisdictions are divided into legal (i.e. white), grey and black. The Commission’s interest also extends to financial risk if a significant percentage of the business is derived from grey markets that could change their approach.

As part of any new licence application, the Commission looks at an applicant’s activities on a case-by-case basis, with particular attention to material and target markets, the applicant’s approach to risk analysis, the clarity of the law in the relevant jurisdiction, whether they are acting upon legal advice, the approach of the regulator in the relevant jurisdiction, any enforcement action undertaken and relevant contractual arrangements/protection. The Commission’s focus is that it expects operators to have taken and be able to demonstrate that they have taken appropriate steps to assure themselves that they are not operating illegally.

The Commission’s view remains that:

- “due care” is taken and operators have “a reasonably coherent rationale” for what they are doing;
- where there are no “justifiable arguments” to continue to advertise and/or supply, “reasonable attempts” must be taken to stop access;
- it is not acceptable “to hide behind willful ignorance or implausible assumptions”;
- should an operator not take reasonable steps to stop access being gained it may reflect on their integrity and suitability; and
- responsible operators are expected to take reasonable steps to discourage players deliberately flouting domestic legislation.

Current disclosure requirements

The Commission already collects data on foreign jurisdictions through both LCCP notifications and, separately, through regulatory returns, although each has a slightly different focus. Before and since the implementation of the point of consumption licensing regime, the following requirements currently apply:

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Disclosure stage	What is disclosed?	Who does the information relate to?	
		Applicant/licensee	Group-wide
Application	<p>B2Cs:</p> <ul style="list-style-type: none"> • If total revenue is less than £5m, any market where the applicant gets 10% or more of their total revenue from players. • If total revenue is more than £5m, any market where the applicant gets 3% or more of their total revenue from players. • Any additional markets that are “actively targeted” regardless of the thresholds above. This includes any local homepages, local languages, local currencies or local payment methods. <p>B2Bs:</p> <p>Approximately what percentage of revenue comes from:</p> <ul style="list-style-type: none"> • Operators with point of consumption licences in jurisdictions other than Great Britain; • Commission-licensed operators; and • Other operators where the B2B may be uncertain about the players’ locations. <p>Plus, how the B2B decides to whom it will deal with and details of any technological protections.</p>	✓	✓*
Regulatory returns	List of jurisdictions indicating percentage of revenue derived from those locations.	✓	✗
Key event (ongoing)	<p>Licence condition 15.2.2:</p> <p>“becoming aware that a group company which is not a Commission licensee is advertising remote gambling facilities to those residing in a jurisdiction in or to which it has not previously advertised.”</p>	✗	✓

* Strictly speaking this information is not required; however, in my experience, the Commission’s interest generally extends to wider group activities at the application stage. In the spirit of being open and transparent with the Commission, applicants are encouraged to provide a sufficiently detailed summary of wider group activities to enable the Commission to develop a good understanding and to probe matters of interest at its discretion.

A cursory glance of this table confirms the inconsistent approach that applies to the reporting of foreign jurisdictions during the licensing life cycle. As the Commission acknowledges in the response, the regulatory returns reporting, which only relates to the licensee, does not represent the wider picture of the group (required as part of a new licence application). While key event reporting provides a historical view of jurisdictions in which the group has advertised, it does not provide any indication of the magnitude of group revenues within those jurisdictions.

New requirements

As part of the original consultation document, the Commission proposed making a “slight change” to the LCCP notification to indicate either when the group begins advertising to a new jurisdiction, or the 3%/10% jurisdiction threshold being passed for the group. The Commission goes on to say: “The requirement is to notify the Commission at such time as the group becomes aware of the change and focuses on upon a significant or sustained change in the group’s revenue profile by jurisdiction.”

The crucial words are “significant or sustained change”, which were added by the Commission to avoid operators having to

inform of a relatively small-scale or short-term change in revenue, but where operators do not expect such revenue change to apply in the future on a sustained basis. The Commission plans to consult with operators before the new requirement comes into force in April 2018, to work on definitions of data points.

The words “at such time as the group becomes aware of the change” do not provide any guidance on timing. The response states that the reporting period would be against the licensee’s usual reporting period and would relate to a quarter or year, dependent on various factors, including the size or organisational structure of the group. At the recent remote sector meeting, the Commission indicated that it could be acceptable to review the position every six months or every year depending on group reporting. The licensee would therefore notify the Commission if its internal report revealed that it had gone over 3%/10% (as appropriate) on a sustained basis. This reinforces the need for licensees to develop accurate and timely systems to monitor revenues for each jurisdiction.

Conclusion

The driving concern behind these changes remains suitability to hold a licence. As the

Commission notes, groups of companies often share funding arrangements, expertise and gaming liquidity. Commission licensees often do not directly trade in other markets, but may benefit from related companies doing so. This therefore raises questions of the legality of funding to Commission licensees from other group companies trading in other jurisdictions.

There is no doubt that the changes will create more work for licensees and it would be sensible for operators to ensure their internal systems are prepared. In theory, the new requirement should place licensees on a level playing field and enable the Commission to identify any licensees “funneling” their foreign activities to avoid regulatory scrutiny. Watch this space.



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