

# GAMBLING COMMISSION

## **Regulatory decisions: Procedures and guidance for the Regulatory Panel**

**November 2010**

# 1. Introduction

## 1.1 The purpose of this guidance

The purpose of this guidance is to assist employees and Commissioners to carry out their functions in accordance with the Gambling Commission's (the Commission) policies and procedures and to comply with the law.

A key aim of this guidance is to ensure that there are no grounds for suggesting that a decision maker has been biased, partial or that the decision is not well founded in any way. This guidance also seeks to ensure that the Commission meets the requirements of the Human Rights Act 1998 and the principles of natural justice. This guidance needs to be read in conjunction with:

- the Statement of principles for licensing and regulation, issued pursuant to section 23 of the Gambling Act 2005 ('the Act')
- the Licensing, Compliance and Enforcement policy statement
- the Statement of principles for determining financial penalties (issued pursuant to section 121 of the Act).

## 1.2 The licensing objectives

In carrying out its functions, the Commission must aim to pursue and have regard to the licensing objectives, which are:

- preventing gambling from being a source of crime or disorder, being associated with crime or disorder or being used to support crime
- ensuring that gambling is conducted in a fair and open way
- protecting children and other vulnerable people from being harmed or exploited by gambling.

The Commission must also aim to permit gambling, in so far as the Commission thinks it reasonably consistent with pursuit of the licensing objectives.

## 1.3 Who has the power to make decisions about licences?

Paragraph 8 of Schedule 4 of the Act provides that:

- (1) The Commission may delegate a function to:
  - a. a Commissioner
  - b. a committee consisting of Commissioners
  - c. an employee of the Commission.
- (2) Sub-paragraph (1) applies to any function of the Commission including in particular:
  - a. a discretionary function
  - b. the function of conducting a review
  - c. the function of determining whether to revoke a licence or of determining whether to impose a requirement to pay a penalty.

The Commission has approved a scheme of delegations setting out who has the delegated authority to make regulatory decisions. As part of that scheme the Commission has established a Committee of Commissioners, on which any Commissioner may sit, known as the Regulatory Panel ("the Panel").

## 1.4 The legal framework for decision making

The decisions to be taken, whether by the Panel or by employees acting under delegated powers are all administrative decisions, which must be taken in accordance with the framework set out in the Act and the principles of fairness and natural justice, the basic requirements of which are set out in this part.

The Commission exercises its functions in the public interest. Decisions must be made openly, impartially, with sound judgment and for justifiable reasons. This means that decision makers must:

- come to the decisions they make with an open mind and demonstrate they are open minded
- make a decision only after due consideration of all information reasonably required upon which to base such a decision
- seek further information if it is felt there is insufficient information to reach a decision.

It is important that decision makers have not already taken a firm view on a matter, nor give the appearance of having made up their mind before the formal consideration of a regulatory matter. However, a decision maker will not have taken a firm view on a matter by just:

- listening to viewpoints from interested parties
- making comments or giving a provisional view, provided that it is clear that the issue has not been prejudged
- seeking information through appropriate channels
- asking questions at a hearing which reflect issues raised.

If a decision maker has any concerns about procedural fairness then they should seek advice from the Commission's legal advisers.

## 1.5 Referral of case to the Panel

There are three reasons why a matter will be referred to the Panel:

- certain decisions will be reserved to the Panel for decision
- there may be cases where the particular circumstances of the case mean that it is appropriate for a case to be referred to the Panel for consideration
- where officials consider that the Commission should exercise its regulatory powers under section 117 of the Gambling Act 2005, a 'minded to' letter is sent to the licensee offering them a hearing before the Regulatory Panel at which they will have an opportunity to appear or make further written representations before a final decision is made.

## 1.6 The Human Rights Act 1998

Article 6(1) of the European Convention on Human Rights (the Convention) provides, so far as relevant, as follows:

*"In the determination of his civil rights and obligations . . . everyone is entitled to a fair and public hearing . . . by an independent and impartial tribunal..."*

The determination of whether to impose a regulatory sanction is likely to amount to a determination of the licensee's civil rights or obligations within the meaning of Article 6(1) of the Convention. The Commission's procedures have therefore been designed to ensure, so far as possible, that the requirements of the Human Rights Act 1998 and the Convention are met. The right of appeal to the First-tier Tribunal (Gambling) is also an important element in ensuring that an individual's Convention rights are protected.

## 1.7 Conflicts of interest

Commissioners and senior employees are required to complete a declaration of their outside interests. The Commission also has a strict policy on the acceptance of gifts and hospitality. Even so, care must also be taken to ensure that in every case there is no conflict of interest or the risk that there may be a perception of a conflict of interest.

Decision makers may have a conflict of interest in a matter if it affects them, their friends, relatives or employer. If a decision maker has a personal and potentially prejudicial interest in a matter then they:

- must not take a decision or sit as a member of a Panel, or otherwise take part in the decision making process
- must leave the room when that item is being discussed and must not participate in or give the appearance of trying to participate in the making of a decision
- must not lobby those who will be making the decision in question.

Decision makers must take care to avoid giving the impression that they are not independent or impartial or that their decision making process is biased, or there is a risk of apparent bias.

The test for apparent bias was set out in *Porter v Magill* [2002] 2 AC 257: "The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility...that the tribunal was biased." The test for apparent bias is an objective one, which requires an assessment to be made in the light of all of the facts of the case.

If a decision maker is in any doubt about whether there might be a possible conflict of interest then they should seek advice from the Commission's legal adviser.

## 2. Preparing for a Panel hearing

### 2.1 Introduction

Regulatory reviews are those conducted under the provisions of section 116 of the Act. The Commission has produced a statement of principles on licensing and regulation, setting out the principles which the Commission will apply when exercising its functions. Further details about how licence reviews will be conducted can be found in the licensing, compliance and enforcement policy.

The purpose of a hearing is to allow the Panel to consider whether the Commission should exercise its regulatory powers under section 117 of the Act.

### 2.2 Adherence to time limits

It is in everyone's interests for the time limits set out below to be adhered to. Adhering to the time limits supports proper case preparation, which in turn enhances the fairness and transparency of the process and avoids the possibility of postponement and delay. The Panel should therefore seek to ensure that time limits are met.

### 2.3 Documentary and other evidence

The licensee and the Commission's representatives are expected to agree a bundle of relevant documents **at least 14 days prior to the hearing**. In the absence of an agreed bundle, the Commission's representatives will prepare a bundle of relevant documents.

In some circumstances material which is not suitable for photocopying and distribution will be available for inspection by the Panel on the day, having previously been available for the licensee to inspect. In exceptional circumstances there may be material, which is relevant to the decision which the Panel must make, but which is not suitable for disclosure to the licensee. Legal advice should be sought wherever this appears to be the case.

Save in exceptional circumstances, a copy of the bundle will normally be sent to the Panel and the Legal adviser **no later than seven days prior to the hearing**.

### 2.4 Agreed facts

Where possible, a statement of facts will be prepared by the Commission and agreed with the licensee so that agreed facts can be put before the Panel. Where the facts of the case are disputed, or not agreed, then the licensee or their representative and the Commission's representative will have the opportunity to put their version of events to the Panel. This may be done in person, or if nobody objects to the matter being dealt with on the papers alone then the Panel will consider the case on the papers.

### 2.5 Case management hearings

In exceptional circumstances it may be necessary for there to be a case management hearing, at which the Panel may issue directions about the future conduct of the case. For example, the Panel may give directions about the service of documents or about who they expect to attend the substantive hearing on behalf of the licensee or the Commission.

If directions are issued, a formal record of the directions will be sent to the licensee **within seven days** of the case management hearing. Any such directions are binding on both the licensee and the Commission's representatives. In the event that directions are not complied with the Panel may draw such inference as it considers appropriate in relation to the admissibility of evidence or any other relevant matters.

These case management provisions are without prejudice to the ability of the Panel at the substantive hearing to give such directions for the management of the case as it sees fit.

## **3. The hearing**

### **3.1 Appointment of the Chair**

The Chairman of the Commission shall, if present, preside at all meetings of the Panel. If the Chairman is not present, he may designate a Commissioner to chair the meeting. If there has been no such prior designation the Commissioners present at the meeting shall elect a Chair for the duration of the meeting.

### **3.2 Voting**

Decisions of the Panel will normally be made by consensus. Where that cannot be achieved the Panel Members are required to vote, in which case the Chair of the Panel will have a casting vote in the event of a tie.

### **3.3 Attendance of the licensee and their representatives**

The Panel would normally expect that the licensee and relevant persons identified by the Commission's officials will attend the hearing. Licensees may also be accompanied by a legal representative.

Where a licensee has indicated that they wish to appear or be represented before the Panel, but they or their representative then fail to attend at the hearing without good reason the Panel may continue in the licensee's or their representative's absence. No inference should be drawn from the licensee's absence.

### **3.4 Attendance of representatives from the Commission**

The Chief Executive may designate such employees as she considers appropriate to attend meetings of the Panel to assist or advise the Panel, but those employees may not take part in the decision making process of the Panel. The Commission may also be legally represented at hearings before the Panel.

### **3.5 Promoting an investigative approach**

All those involved in hearings are expected to assist the Panel to determine the relevant facts and the Chair should direct those present to adopt an investigative rather than an adversarial approach. The purpose of this provision is twofold:

- to ensure that all relevant issues are explored fully
- to ensure that the proceedings do not become unnecessarily adversarial in nature.

Should the Chair consider that the approach being taken by either the licensee, or their representative, is obstructive or unnecessarily adversarial, they should intervene to ask the licensee, or their representative, to refrain. If this does not resolve the matter, it may be necessary for the Panel to adjourn to consider the issue in private. The Chair may then decide to issue appropriate directions as to the subsequent conduct of the hearing.

The Chair and Commissioners should take an active role in the proceedings through questioning the licensee, or members of the Commission's staff who are present, and seeking clarification of points through the licensee's representative, if they have one. Where the Chair and Commissioners consider that all the relevant issues have not been raised or fully explored

in the course of the evidence they will need to make sure that such issues or deficiencies are, as far as possible, covered through their questioning.

It is particularly important that Commissioners are satisfied that they have enough information before them to make a decision, where a licensee does not appear at the hearing and is not represented.

### **3.6 Meetings by telephone or video conference**

Meetings of the Panel may be conducted at a face to face hearing, or by telephone or video conference.

### **3.7 Dealing with regulatory matters on the papers alone**

If the licensee is content for matters to be dealt with on the papers alone, then the Panel may meet and carry out its work in the absence of the licensee. The Panel should still adopt the decision making process described below. No inference should be drawn from the licensee's absence.

### **3.8 Determining whether the hearing should be in public or private**

The Commission's policy is that hearings are held in private (ie in the absence of persons other than the directly interested parties). However, there may be occasions when the licensee would like the hearing to be in public and as such careful consideration should be given to such a request. In deciding whether to grant such a request, the Panel will need to weigh up any potential prejudice to the rights of any third parties or prejudice to the overall fairness of the process against the licensee's reasons for requesting a public hearing. However, even if the Panel does decide to proceed in public, the Panel may decide to exclude the public and the press from all or part of the hearing where they consider that a public hearing may adversely affect the fairness of the process.

### **3.9 Deliberations in private**

The Panel may determine, at any time, to deliberate in private (ie in the absence of any other person, including the directly interested parties). If legal advice is sought and given whilst the Panel is in private session the Chair should invite the legal adviser to repeat the advice in front of the licensee so that they have an opportunity to comment on the advice that has been given.

### **3.10 Role of the legal adviser to the Panel**

A legal adviser will normally be present at all proceedings of the Panel. The legal adviser's role is to provide the Panel with any advice they require to properly perform their functions, whether or not the Panel has requested that advice, on:

- questions of law and mixed fact and law
- matters of practice, procedure and policy
- the range of outcomes or penalties available
- any relevant decisions of the superior courts or other guidelines
- other issues relevant to the matter before the Panel
- the appropriate decision-making structure to be applied in any given case.

The legal adviser may also:

- assist the Panel by reminding them of evidence
- ask questions in order to clarify the evidence and any issues in the case
- assist the Panel in formulating their reasons and recording the Panel's reasons.

Any legal advice given in private should be clearly stated to be provisional and the adviser should subsequently repeat the substance of the advice in open session and give the licensee an opportunity to make any representations relevant to the advice.

### **3.11 Introductions**

The Chair should introduce the members of the Panel and confirm the identity of those appearing before the Panel. Appearing before a Panel may be a stressful experience for the individual involved. It is important that the Chair is sensitive to this and seeks to put them at their ease so that they can participate fully in the process.

### **3.12 Representations and evidence**

The Panel may consider oral, documentary or other evidence which appears relevant to consideration of the case. The legal adviser can advise the Panel on any issue which arises as to the admissibility of, or the weight to be given to, any item of evidence.

At the start of the hearing, the Chair should confirm that the licensee and their representative are in possession of all relevant documentation and whether the bundle is agreed. The Chair should also check whether either the licensee or the Commission's representatives wish to rely on or to introduce any documents that are not already included in the case papers. If either party does wish to do so, then the Panel will need to consider the nature of any such document, the reasons for it being produced at a late stage and whether its admission would be likely to assist in the fair disposal of the hearing. It may be necessary to allow a brief adjournment for the licensee or the Commission's representatives to read the document in question. This is also the point at which any other issues relating to the documentation can be clarified.

### **3.13 Dealing with disputed evidence cases**

Where some material facts of the case are disputed, the Commission's representative will be permitted to make an opening statement about the case. The licensee will then be given the opportunity to reply either in person or through their representative.

The Commission's representative and the licensee may present relevant written evidence relating to the facts in dispute and may, with the permission of the Panel, call witnesses.

As a general rule the Commission does not expect that it will be necessary for witnesses to attend hearings. In those exceptional cases where witnesses are to be called to give oral evidence, the Panel should seek confirmation at the outset of the hearing of which witnesses are to be called and how long their evidence might take.

In those cases where witnesses are to be called, any witness statements that have been prepared will normally be taken as the evidence-in-chief of that witness.

Normally whoever calls the witness will be allowed to ask some questions to clarify their statement before the witness is asked questions by the other party or the Panel.

The Chair should ensure that there is opportunity for the witness to be re-examined, if that is appropriate. However, such questioning should be confined to any 'new' areas arising from the questioning and should not repeat the original questions posed. Exceptionally, the Panel may allow further questioning by the other party on the new areas.

The Chair should ensure that this stage is limited to questioning of the witnesses and not to the making of statements.

Witnesses may be recalled at the discretion of the Panel, for example this may be appropriate if it is necessary to resolve any conflict in the evidence. If a witness is recalled it is for the Panel to determine the scope of any further questions but the licensee and the Commission's representative must have an opportunity to ask further questions.

After receiving evidence, the Chair may then ask whether the witnesses wish to remain in the hearing room or be released – but the Panel should only decide whether they should remain or not having heard any submissions on that topic by the parties.

### **3.14 Summing up**

The Panel should normally permit both the licensee and the Commission's representatives to sum up. The Commission's representative should sum up first, followed by the licensee.

Any summing up must be confined to relevant matters which have been considered during the hearing. The Chair should ensure that under no circumstances is new evidence introduced during summing up.

### **3.15 Requests for further information**

It is particularly important that the Panel are satisfied that they have enough information before them to make a decision. Where the Panel decides that they need further information before being able to make a final determination they may request the licensee or Commission's representatives to provide that information and may adjourn the hearing until the information is available. When adjourning for this purpose, the Panel should give directions about the time limits for the information to be provided.

### **3.16 Adjournments**

During the hearing it is important that the Chair allows sufficient breaks to avoid loss of concentration and fatigue on the part of participants. It may also be necessary to have adjournments during a hearing for the Panel to deliberate in private or to take advice on legal or procedural matters.

### **3.17 Decision making**

In all cases the Panel will deliberate in private, in the presence of their legal adviser. The Secretary to the Regulatory Panel may also be present.

## 4. The decision making process for regulatory decisions

### 4.1 Determining the facts (to be carried out in every case)

In reaching a decision on the case, the Panel must firstly determine the facts as relevant to the matter under consideration. If there is a dispute about the facts of the case, the standard of proof required at all stages of the Panel's decision-making process is the civil standard, 'on the balance of probabilities'.

The 'balance of probabilities' standard means that the Panel is satisfied an event occurred if the Panel considers that, on the evidence, the occurrence was more likely than not.

### 4.2 Stage 2: Deciding what should be done in the light of the facts found

Once the Panel is satisfied as to the facts, then the Panel must go on to consider whether in the light of the facts found it is appropriate for the Commission to exercise its regulatory powers under section 117 of the Gambling Act 2005.

The Commission carries out its functions in the public interest. This includes taking account of:

- the need to protect members of the public
- the need to maintain public confidence
- the importance of declaring and upholding proper standards of conduct and competence by licensees.

In determining whether or not to exercise its regulatory powers the Panel should have regard to the following published documents:

- Statement of principles for licensing and regulation
- Licensing, compliance and enforcement policy statement
- Statement of principles for determining financial penalties
- Guidance on the regulatory decision making after a licence review.

### 4.3 Financial penalties

Where the Panel is minded to impose a financial penalty on the licensee and the licensee is present when the Panel announces its proposed penalty and reasons, then if the licensee is content to make their representations to the Panel, at that point the Panel may allow that. In all other cases the Panel's decision will be accompanied by a notice which complies with the requirements of section 121 of the Act.

The Panel must consider the licensee's representations before deciding whether to give the licensee a notice requiring them to pay a penalty. The notice will confirm the amount of financial penalty and the date by which it should be paid to the Commission (normally 14 days from the date of the letter).

#### 4.4 Suspension

Where the Panel decides to suspend a licence the decision letter will specify the time when the suspension takes effect and either the period for which the suspension shall last, or that the suspension will last until some specified event.

#### 4.5 Revoking a licence

Where the Panel decides to revoke a licence the decision letter will specify the time when the revocation takes effect.

#### 4.6 Communicating the decision

The Panel's decision will be confirmed in writing within 14 days of the conclusion of a hearing. The written decision letter will normally comprise a statement of:

- the matter being considered by the Panel
- a summary of the evidence and representations
- the findings of fact
- the Panel's decision
- the reasons of the Panel.

Where appropriate, the decision letter will remind the recipient that they have the right to appeal to the First-tier Tribunal (Gambling).

**Gambling Commission November 2010**

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### **Keeping gambling fair and safe for all**

For further information or to register your interest in the Commission please visit our website at: [www.gamblingcommission.gov.uk](http://www.gamblingcommission.gov.uk) Copies of this document are available in alternative formats on request.

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