wiggin

Expert insight

for the gambling sector 2024

Contents

Foreword

After a series of false dawns, the eagerly anticipated White Paper finally landed in April 2023.

Those industry players that had been expecting or hoping for concrete proposals in the White Paper and a clear direction of travel for gambling regulation would have been left feeling a little short-changed. Stakeholders are now left to grapple with an extended state of flux owing to the not-insignificant number of consultations spanning multiple areas, such as online player protections, consumer redress, and the regulator's powers and resources. DCMS and the Gambling Commission have been launching, and continue to launch, consultations in batches since last summer and they are not done yet.

It isn't just the White Paper that the industry has had to keep an eye on recently, however. The Gambling Commission has continued its compliance and enforcement activity and entered into a record-setting regulatory settlement. Significant compliance updates have also kept operators busy, such as the publication of the updated formal guidance on customer interaction for remote gambling operators which eventually took effect in October 2023. Advertisers have also been left somewhat confused by a spate of ASA adjudications on what might amount to 'strong appeal' to minors. Overseas, certain jurisdictions – in particular in LATAM – continued to promise the introduction of gambling legislation that will significantly impact the '.com' market.

Not only have we advised on the areas touched on above, we have also continued to advise on a broad array of matters, including significant corporate deals in the sector, the introduction of the Economic Crime Levy and its possible application to licensed casino operators, the industry's evolving use of data, and key consumer, tech and media issues as they arise.

We are uniquely placed in that we draw upon the expertise of our colleagues across our firm, with Wiggin being the true representation of a sector-focused law firm.

The articles in this brochure offer just a glimpse of the key matters and challenges facing the industry at this moment in time and we hope our commentary and analysis is thought-provoking. We would, of course, welcome and encourage you to discuss with us any of the issues raised.

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01 Gambling regulatory

It's all about governance

Over the course of the last few years, coinciding with the emergence of industry behemoths through consolidation and the rapid regulation of online gambling around the world, the industry has undergone something of a governance evolution.

Successive enforcement actions brought by the British Gambling Commission focused on what they perceived to be governance failings at the highest level of organisations that simply were unable to meet regulatory expectations.

One only needs to look at the most recent Annual Assurance Statement (the process by which the Commission extracts from operators' management teams assurances that they themselves are, well assured about compliance) to see the governance focus playing out in real time. The Commission required operators to 'simply …. confirm that you and your Board are assured of your business's compliance'. There is clear peril here, with the Commission threatening action if it does not 'find evidence to support your assurance' in subsequent compliance assessments.

Yet, it was the recent publicity around the way the old GVC was found to be operating in the 2010s and the resulting Entain deferred prosecution agreement that has really brought governance into focus. The stark warning given by law enforcement agencies is to be taken seriously. It is incumbent on operators to fully understand how they do what they do, wherever they do it. Operators were told by the Crown Prosecution Service to 'reflect on the implications for their own corporate compliance procedures'. They have to understand how the laws and regulations back home impact the business methods, particularly payment processing, that facilitate all their revenue generation.

Operators and suppliers must consider anti-bribery and corruption laws, proceeds of crime laws and be comfortable with the 'suitability' of all commercial partners.

Where should an operator begin? With undertaking proper risk assessments, mitigating risk as much as they can and then assessing the residual risk. There needs to be a good answer to the question "*could this happen to us?*". Clearly, many operators will immediately distinguish themselves from the old GVC Turkey business. But when faced with this question, they need an informed answer. If there is one thing that should worry operators it will be doubts around how to actually obtain an answer to the question, let alone the answer itself. Ultimately, they need to have the conviction to kill a revenue stream and eradicate the risk entirely if they can't get the answer they need.

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Friction-filled checks? Uncertainties surround financial risk checks in UK gambling industry

No other area of regulation has attracted the same level of intense scrutiny and debate as the muddled concept of “affordability” in British gambling.

The Government’s White Paper has required the Gambling Commission to re-think its approach to this difficult area, which has previously seen it publicly state that “customers wishing to spend more than the national average should be asked to provide information to support a higher affordability trigger such as three months’ payslips, P60s, tax returns or bank statements…”[1].

Instead, the Government expects mandatory ‘light touch’ financial vulnerability checks and ‘enhanced’ financial risk checks to be carried out when a customer’s net losses exceed certain pre-determined thresholds and that these checks should be “frictionless” for the vast majority of customers who are subjected to them. The approach aims to strike a balance between protecting vulnerable gamblers and ensuring that the checks do not unduly inconvenience the majority of customers.

The Commission consultation that sought to give effect to the Government’s intentions and closed on 18 October 2023 raised concern among industry stakeholders that the proposed checks go further than those proposed in the White Paper and therefore fail to strike the appropriate balance.

The occupation dilemma

Under the Commission’s proposal, financial vulnerability checks (those that will be performed when any customer loses £125 in a rolling 30-day period or £500 in a rolling 365-day period) will require operators to use average salary data related to their stated employment status and job title[2] to take appropriate action. If introduced as proposed, it would effectively make gambling beyond these levels conditional upon customers telling operators what they do for a living.

It will be immediately obvious to any reader that requiring customers to provide their employment status and job title necessarily introduces friction into the process of completing the financial vulnerability check that is contrary to the Government’s stated ambition that the vast majority of customers will ‘not even know these checks are happening’.

In defending the proposal, Commission officials have explained that many operators are already collecting occupation data when online accounts are registered. In reality, operators have not sought to collect this information voluntarily, but because they have been coerced into doing so by threat of enforcement from Commission compliance and enforcement officials who continue to maintain (without adequate justification) that their failure to collect occupation on registration is a breach of their AML obligations. Operators are then left to determine when they should corroborate a customer’s stated occupation (introducing further potential for friction) and expose themselves to Commission criticism if they fail to do so early enough in the customer relationship.

1. Raising Standards for consumers - Compliance and Enforcement report 2019 to 2020 https://www.gamblingcommission.gov.uk/print/raising-standards-for-consumers-compliance-and-enforcement-report-2019-20

2 In combination with credit reference agency checks against bankruptcies, IVAs, CCJs (etc.) and postcode deprivation indexes

Key challenges of enhanced financial checks remain unclear

The proposal has raised a number of questions regarding the role of credit reference agencies (CRAs) and whether existing creditworthiness assessments routinely performed in the consumer credit sector can actually work when applied for the purpose of assessing whether a customer's level of spend is likely to be harmful to them.

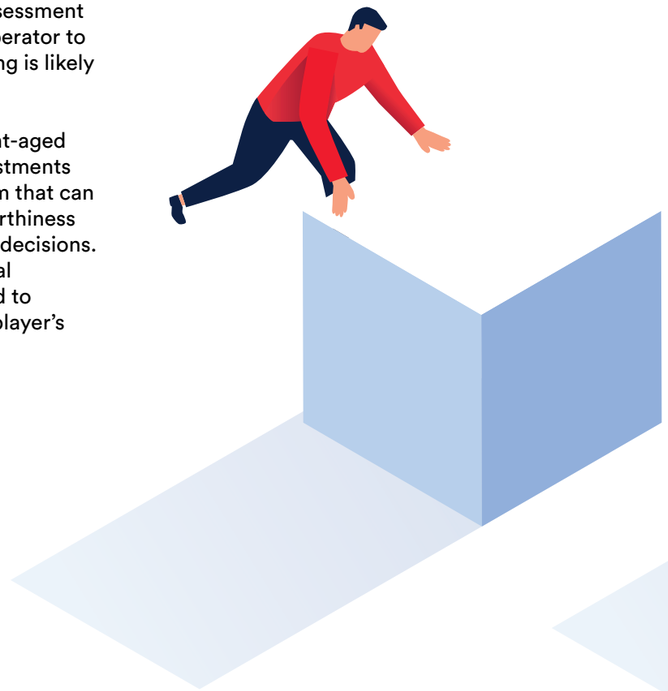
One key concern revolves around the scope of enhanced financial checks and what will actually be shared with operators.

The Commission's proposals assess that CRAs will be expected to access credit performance data and information about a customer's income and expenditure, such as current account turnover. However, the proposal is still in the process of being scoped, tested and approved, and it remains unclear how these data points will be used to undertake a meaningful financial risk assessment and how any result will be used by an operator to determine whether a customer's gambling is likely to be harmful to them.

For instance, self-employed or retirement-aged individuals who rely on pensions or investments may not have a consistent income stream that can be easily tracked by traditional creditworthiness assessments used for consumer lending decisions. In such cases, relying solely on traditional creditworthiness assessments could lead to inaccurate or unfair judgments about a player's financial standing.

What action will operators be expected to take?

The Commission has not proposed a detailed decision-matrix that operators will be required to follow after a financial check is completed, instead proposing that operators will be expected to take 'appropriate action' based on the customer's circumstances. This will range from no further action through to ceasing the relationship entirely (and all actions in between), but no real indication is yet given on Commission expectations, leaving operators with broad discretion to determine what is 'appropriate' and 'proportionate'. A reluctance to prescribe what operators must do is understandable, but risks undermining the efficacy of these proposals by the inevitable differences in the approaches that will be taken without further guidance on expectations.



The Commission seeks to address this efficacy challenge by insisting that, when financial risk is identified (whatever that means), operators must carry out decision-making manually, rather than via automated solutions. While this is described as the "appropriate balance to be struck in the context of the information and data the operator will be dealing with and the menu of possibilities in terms of action", in practice this is more likely to lead to reduced efficacy and poorer decision-making.

Requiring human operators to manually review and interpret data that has already been analysed by an automated system introduces several potential pitfalls that can lead to inaccurate or inconsistent decisions and risks unnecessarily burdening operators with time-consuming and resource-intensive processes. Automated decision-making systems are capable of analysing vast amounts of data and making informed judgments far more effectively than human operators. This is evident in the financial sector, where sophisticated algorithms are employed to assess creditworthiness and inform consumer lending decisions. There is clearly still a role for manual review, but this should not be at the cost of the obvious advantages that automation can bring.

A need for further refinement

Both the Government and the Commission have been clear that the "new requirements will not come into force until such a time as they are ready". The remaining uncertainties about how the checks will be performed and action that operators will be expected to take means there is still much to be debated and refined to ensure these critical measures actually achieve the Government's position on where the appropriate balance is between consumer freedoms and the prevention of harm to vulnerable people.

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The industry's relationship with the regulator

If you were to ask any given operator what their relationship is like with the Commission, it's likely that you will receive a multitude of answers that will differ to varying degrees.

Some, though not all, operators might point to a working understanding that they have delicately honed over a number of years, while others may paint a less favourable picture of their engagements with the Commission.

The truth is that in any regulated environment, the regulator and the regulated will not necessarily see eye-to-eye on every issue. Industry and the Commission fulfil different roles and, naturally, each will prioritise certain interests and issues over others. Where the Commission does not help itself, however, is in creating a sense that licensee input is dismissed. We have seen this play out in the Commission resolutely persevering with introducing changes to the LCCP without, it seems, taking much, if any, heed of consultation responses from licensees on those changes. We have also seen, through our work on licence reviews, examples of the Commission's compliance team indicating satisfaction on certain significant points only for the enforcement team to later apply a different standard. These things do little to instil confidence in the regulator.

It should also be remembered that the Commission is required to have regard to the 'Regulators' Code'. The Code places an expectation on the Commission (as it does all regulators) to develop "an open and constructive relationship" with licensees, and signposts that the Commission should, for instance, "carry out their activities in a way that supports those they regulate to comply and grow" and "ensure clear information, guidance and advice is available to help those they regulate meet their responsibilities to comply".

It's tempting to unpack whether the Commission has historically paid much attention to the above, but what is of more significance are the sounds coming from the Commission in recent months that speak to where things might be heading. In November 2023, Andrew Rhodes delivered a speech in which he spoke of the need to foster a "much more grown-up relationship" where the Commission and licensees can address issues collaboratively. In that speech, Rhodes spoke of the intention to bake within the next three-year corporate strategy a "focus on communicating clearly" and "building effective partnerships".

The early indicators appear positive, and some clients have pointed to an increase in their engagements with their account managers at the Commission. Clearly, the hope is that under the stewardship of Rhodes, industry and regulator can reset their relationship.

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Remote customer interaction – a responsible mess?

Over the past year, the Commission has set pulses racing with the implementation of both its new Social Responsibility Code Provision ("**SRCP**") regarding customer interaction and the associated customer interaction guidance (the "**Guidance**").

By way of recap:

- On 14 April 2022, the Commission announced a new requirement, SRCP 3.4.3, that would apply to remote operators only, and which was stated to take effect on 12 September 2022.
- On 20 June 2022, the Commission published its new Guidance to accompany this new SRCP, which was also intended to come into effect on 12 September 2022, in conjunction with the SRCP.
- On 2 September 2022, the Commission suddenly announced that part of the new SRCP 3.4.3 and the entirety of the new Guidance, would not take effect on 12 September 2022. The Commission's press release suggested the regulator had acquiesced to the industry request for "an extension to the timeframe…. to conduct further consultation". This delay led to real confusion as to what operators were actually required to do by 12 September 2022.
- The Commission then commenced a "further consultation" on 23 November 2022 in relation to certain requirement changes of the Guidance.
- On 24 August 2023, the Commission published its revised Guidance for remote gambling licensees which came into force on 31 October 2023.

As with any piecemeal rollout, the industry has been left confused about how they can demonstrate their compliance with SRCP 3.4.3, most noticeably because of the lack of regulatory clarity that is present throughout the Guidance.

The Commission states that "for compliance and enforcement purposes, we will expect licensees to demonstrate how their policies, procedures and practices meet the required outcomes. This can be through implementing relevant parts of the guidance or demonstrating how and why implementing alternative solutions equally meet the outcomes".

This works, as an approach, when the outcomes are clear.

Under the new proposed guidance on SRCP 3.4.3 (10) (**"Requirement 10"**), operators will be required to prevent marketing and new bonus offers where "strong indicators of harm" are present. However, a key flaw here is that the Commission does not define what strong indicators of harm are. The Commission continues to reject calls for it to do so and, instead, prefers to "allow some flexibility on the method of implementation", invariably leading to discrepancy in the approaches that will be taken. This runs counter to the stated aim of Requirement 10 to "create a consistent position across licensees".

Similarly, the Guidance includes multiple references to potential "harm" without any apparent academic justification or transparency of what might be considered as potential "harm".

With a lack of regulatory clarity riddled throughout the Guidance, the key challenge for operators will be their ability "to demonstrate how their policies, procedures and practices meet the required outcomes".

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A delicate balancing act

Anyone with any involvement in the British gambling industry will have felt somewhat overwhelmed by the output from the Gambling Commission and the Government during 2023. As we wade through pages and pages of consultations, we ask ourselves ‘how will this all end’?

When the Government announced the Gambling Act Review all the way back in late 2020, they set about “using the evidence to assess whether we have the balance of regulation right”. The Government asserted how it also respected “the freedom of adults to choose how they spend their money”. The White Paper sought to estimate its impact on the industry with a resulting reduction in economic performance. However, there was relatively little about the ‘regular punter’, whose voice has grown louder over the recent months. The public spat between the Commission and the Racing Post during the autumn demonstrated, it is fair to say, misunderstandings on both sides as to how the other side interpreted the challenge of the right balance in regulation.

When the Commission ran the ‘Affordability Consultation’, over the winter of 2020-21, it invited the input of the consumer by way of a questionnaire which elicited over 12,000 responses. It has never been clear to us how those responses informed subsequent regulation.

With so much criticism coming from the influential race lobby, leaning on the objections of its own customers, the Commission’s authority and legitimacy is on the line. In the eventual output that enshrines financial vulnerability checks and financial risk assessments, the regulator must demonstrate how it considered all the consultation responses it receives.

At the heart of all this is the customer, whose voice must be heard.

The industry continues to call for its version of balance, citing the failure of regulation in many European states to curb the black market. The Commission has continued to downplay the significance of the black market in the UK, but would be wise not to discount it entirely. If the Commission gets the balance wrong between customer freedom and customer protection and mandates processes which tip the balance far more towards protection than freedom, it will not only inconvenience the overwhelming majority of regular punters, but it will drive many of them into the arms of the black market as they simply refuse to open up their finances to their locally licensed bookmaker.

A further, hidden consequence to all of this could be that people simply stop gambling. If the regular punter finds themself having to produce bank statements to their bookie in order to punt as they have done for years unincumbered, some of them will simply say to themselves ‘this isn’t for me anymore’. The Commission needs to listen to the voice of the customer in the coming months.

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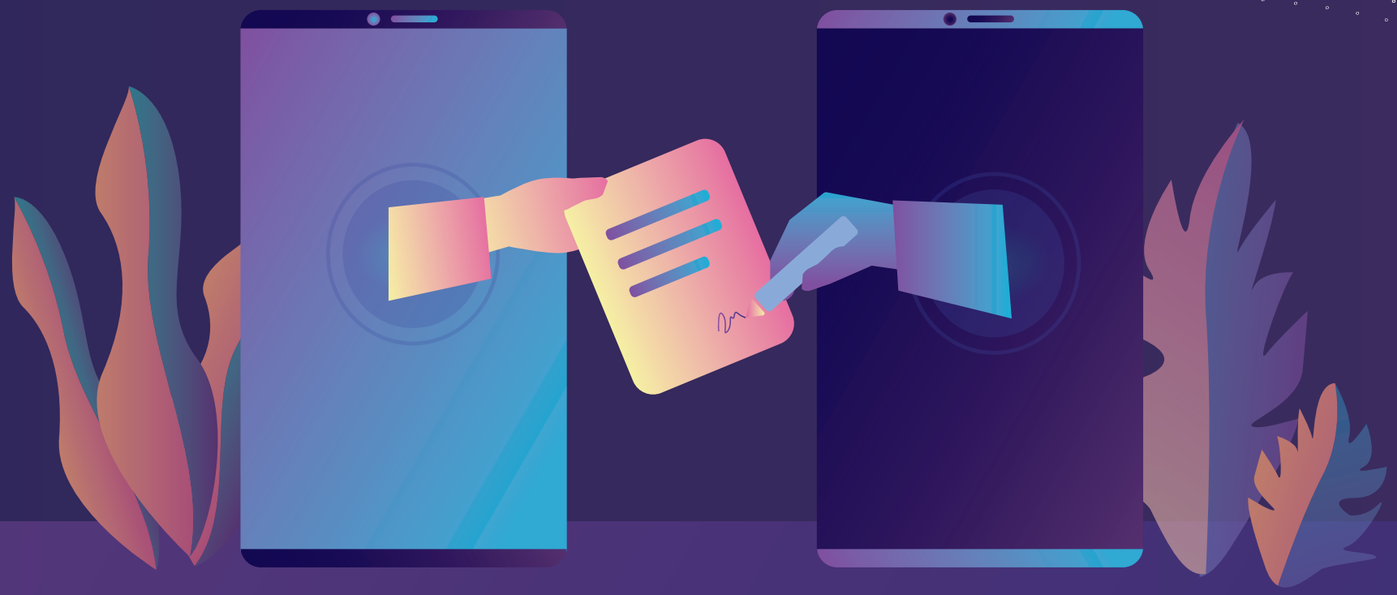

Communicating the change of corporate control

Licensees will be aware of their regulatory and legal obligation to notify, and submit an application to, the Commission following a change of corporate control ("CoCC").

Leaning on the 'controller' test set out in the Financial Services and Markets Act 2000, a 'controller' of a licensee is – at high-level – a person or entity that holds 10% or more of the shares or voting powers in the licensee (or in a parent entity of the licensee) or is otherwise able to exercise significant influence over the management of the licensee. (Shareholdings of 3%+ in the licensee (or parent) must separately be notified to the Commission as a key event.)

Crucially, on receipt of a CoCC application, the Gambling Act 2005 requires the Commission to either determine that the licence may continue to have effect with the new controller in situ or to revoke the licence. The decision is binary, and a negative determination will be fatal to the UK-facing business of the gambling operator. The Commission has revoked licences over concerns relating to the suitability of incoming controllers – the risk of revocation is not theoretical.

The CoCC process throws up a host of issues that licensees and incoming controllers should be thinking about prior to the CoCC event, and it is not uncommon that the substance of the Commission's enquiries will concern the latter, even though the obligation to submit the CoCC application and the risk to the licence is on the former. For instance:

Knowledge of the CoCC: Does the licensee have the right internal controls in place to recognise, in good time, when a CoCC has actually occurred? What those controls look like will differ depending on circumstance and the nature of the licence-holding entity. A listed licensee should be keeping a close eye on the day-to-day movements of institutional investors hovering around the 10% mark and take into account any knowledge around investors that are acting in concert, while limited companies (especially those with complicated ownership structures) that are acquisition targets should be aware that any pre- and post-sale reorganisations can, in and of themselves, amount to a CoCC.

Investors: To what extent is the licensee conducting diligence on investors? Has the licensee communicated that an investor will have to go through differing degrees of probity checks at interests amounting to +3% and +10%? When determining a CoCC application, a primary focus of the Commission will be assessing the suitability of the incoming controller. Investors should be going into the CoCC process with their eyes open to the probity checks to which they may be subject.

Source of Funds: Linked to the above, the Commission will scrutinise the source of funds used to finance any investment or transaction amounting to a CoCC. The Commission expects extremely detailed information on funding (even in cases where the investor itself operates in a regulated space). We have seen this be a particularly contentious issue – for understandable reasons – where, for example, investments have been financed using blind pool vehicles and the Commission has demanded that the incoming controller make disclosures on underlying LP investors that have no visibility of the investment.

The above is just a snapshot of some of the issues that licensees and would-be controllers should be thinking about. What is key is that incoming controllers are clued up on the CoCC process and the significance of their role in the same, and licensees have the right controls in place to recognise CoCC events and to ensure that complete applications are submitted within the statutory five-week deadline.

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Statutory Levy – all for one and one for all

When the White Paper was first published, the Government was clear in its intention to, "introduce a statutory levy paid by operators and collected and distributed by the Gambling Commission under the direction and approval of Treasury and DCMS ministers".

This initiative caught the attention of many, seeking, to a degree, to play to the audience by replacing the current system of voluntary industry contributions with a mandatory levy. While Parliamentary groups, health stakeholders and academics argue that the current voluntary nature of the 'industry contributions' gives too much influence to the industry, critics have argued that this overlooks the fact that the largest four operators within the industry are already voluntarily offering to pay over £110m to address this issue. That being said, in April 2023, the BGC issued a statement which welcomed the introduction of a mandatory levy, so long as "it is independent and tiered to protect land-based operators".

The Government published its "Consultation on the statutory levy on gambling operators" on 17 October 2023 which set out its proposals on the key aspects of the levy's design, including its structure, distribution and governance.

The statutory levy will be applied to all operators who hold a gambling licence issued by the Great Britain Gambling Commission, including remote, non-remote and ancillary.

The levy is intended to come into effect in 2024 with the largest four remote gambling operators contributing the highest percentage (1%) of GGY to begin with. By 2027, all remote gambling operators with an annual GGY or gross profit over £500,000 will pay a levy amounting to 1% of GGY, falling to 0.4% for land-based casino gaming and betting operators and 0.1% for land-based arcades, bingo and society lotteries. This is expected to raise approximately £90 million to £100 million per year by 2027.

The Government is consulting on how this money will be distributed; however, it is expected that between 10 – 20% of this amount will be directed towards research; between 15 – 30% will be directed towards prevention, including regulatory restrictions on products, place and provider, as well as more specific protections for at-risk individuals; and between 40 – 60% will be directed towards treatment for gambling harms across Great Britain.

The distribution of levy funds will require DCMS and HM Treasury approval, supported by a central government Levy Board, including representatives from the Department of Health and Social Care and the Department for Science, Innovation and Technology.

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Operating in .com markets – a fork in the road?

The proliferation of local licensing systems in recent years (particularly across Europe and North America, with a swathe of South American markets set to follow) has left some commentators wondering if the derivation of online gambling revenues from end users in the so-called .com or grey markets has a future.

It hasn't helped that operators licensed in Malta and Gibraltar have an ever-reducing scope to justify accepting bets or wagers from customers located in other EU member states due to a combination of the further introduction of (arguably) compatible licensing regimes and Brexit, respectively.

Furthermore, the global regulatory direction of travel over the last decade has placed increased emphasis on operators and suppliers in the sector to understand the legal and regulatory risks associated with .com activity. This is both to justify their position to their own regulators (who have shown a preparedness to distinguish between grey and black market activity) as well as to other key stakeholders (such as banks). There is also the spectre of bad actor provisions being introduced in the transition from a point of supply to point of consumption model (e.g. the Netherlands) that can lead to a pre-emptive market withdrawal.

Given the above, some operators (particularly where listed and/or committed to chasing the huge prizes offered by a podium finish in the US) have increasingly focused on regulated and 'regulating' markets. Those operators who have retained ambitions for success in both regulated and a wider range of grey markets have been impacted in relation to the latter by a totally appropriate drive from the reputable multi-jurisdictional licensing hubs (such as Alderney, Isle of Man, Gibraltar and Malta) to improve compliance around AML and responsible gambling. This is accompanied by relatively nascent enforcement against operators who fall short. Meanwhile, operators licensed in other offshore hubs (particularly Curaçao) with limited ambitions for regulated markets (or at least for getting local licences – think Germany) have taken advantage of this, benefitting from light touch regulation and a seemingly 'relaxed' attitude to crypto payment methods and the related risks which many well-regarded regulators (including the Gambling Commission) object to and/or refuse to engage in a debate on.

For all these reasons, some consider that we are at a fork in the road in relation to .com activity. But is that right? Ignoring .com still represents a risk.

With a coherent regulatory risk rationale and appropriate governance safeguards, there remain many lucrative .com markets operators can legitimately target. The overhaul of the Curaçao system could also create a more level playing field assuming the likes of Anjouan and East Timor don't offer a viable light-touch regulatory alternative.

Perhaps most importantly, operators who limit their grey market exposure to 'regulating' markets could find themselves behind the curve if they eschew those markets which may fit into that category in 3 to 5 years. At that point they could be fighting with the big boys to acquire local heroes on eye-watering multiples in order to play catch-up to those who grew organically.

The largest operators relying on the more exotic .com licences are also beginning to show a willingness to dip their toe into regulated markets where they hope their entrepreneurial approach may give them a competitive advantage.

As always, those who get the balance right between risk and reward (whether in the regulated or grey markets) are likely to come out the winners.

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“Why can’t we support that market if they do?”

An oft-repeated question posed of the inhouse legal/compliance functions of service providers supporting the gambling industry. Particularly PSPs.

This is not surprising when the rewards could be lucrative. But the regulatory landscape continues to shift, which is the challenge for those inhouse teams. They must grapple with the evolving position in numerous grey and ‘regulating’ markets, while under pressure to protect or grow market share in a sector where new technologies can mean as many threats as opportunities.

Clearly *“they’re doing it so why can’t we?”* isn’t a coherent rationale for supporting any market, nor a defensible position if your own home state regulator were to challenge your CDD / onboarding procedures for a vertical perceived to be ‘high-risk’.

Now more than ever there is an expectation from internal stakeholders, merchants and the authorities tasked with supervision and enforcement that those who support the industry really do understand it. The ability to track regulatory change and gauge when to react to it isn’t a ‘nice to have’, it is a necessity. A knee-jerk response can jeopardise relationships with merchants, but a failure to react swiftly could mean a competitor stealing a march at one end of the spectrum or exposure to an unacceptable degree of risk at the other.

So it’s a question of being prepared. For a PSP this means first being able to establish, and then to apply, your own risk rationale. Where will you draw the line? Where should you draw the line? What do you do when the line is blurred?

These questions need to be answered for each market where the position isn’t clear cut. We know that .com strategies are evolving and the highest profile B2C operators will inevitably be scrutinising third-party suppliers more closely (particularly PSPs). For some PSPs this may be a threat – but for those regulated in reputable jurisdictions, and with the best understanding of .com risk, it could be a significant opportunity.

Take Hungary, where, despite significant doubts across the industry as to the lawfulness of its casino and (new) sports betting licensing regimes under EU law, the local regulator has demonstrated a renewed appetite for enforcement in 2023. In addition to attacking operators the regulator is targeting the payments chain trying to stem the flow of cross-border transactions. Some B2C operators have already withdrawn from the market, but many will not (at least without a fight).

Whether it’s an EU market like Hungary or a .com market outside of the EU/EEA, a PSP needs to undertake its own nuanced risk assessment. It is important not to be unduly influenced by new market entrants/competitors who are willing to push the envelope, but it is equally important to see things from an operator’s perspective and understand the legal arguments (even if they do not always stack up for you). Ultimately, PSPs that can walk the tightrope between pragmatic support for the industry and robust compliance will be the players that are here to stay.

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Will the introduction of the Gambling Ombudsman kill litigation?

Role of the Gambling Ombudsman

The introduction of the Gambling Ombudsman service is, at least in some quarters, anticipated in 2024. The service will offer a straightforward and cost-free means to redress for customers. The Ombudsman's decisions and interactions with the Gambling Commission will deliver shared learning that should benefit the process of complaints handling for both customers and operators – a virtuous cycle towards clarity and efficiency for all.

The Gambling Ombudsman will focus on claims of breaches of social responsibility or gambling harm in cases of unresolved complaints. This should partially close the current gap in customer redress left outside the ADR and court processes. Contractual claims may still be most efficiently resolved through existing ADR providers, but it remains to be seen precisely how the Ombudsman will sit alongside them.

How will litigation be reduced for operators?

Claims will usually be accepted by an Ombudsman only after the operator has had an opportunity to fairly address a complaint. The Ombudsman's jurisdiction can be expected to be limited to claims of financial harm within a specified cap; brought within a defined time limit; and which can be dealt with proportionately and fairly within the Ombudsman's expertise. Cost ineffective litigation of smaller claims will certainly be spared as a result.

The track record of other ombudsmen in the UK suggests that claims may increase substantially as customers become more familiar with the service. Awards made by the Ombudsman may nonetheless mean a lower overall litigation cost for operators if there is a reduction in frivolous or vexatious claims, and if fewer cases must be settled under the spectre of litigation cost risk. Where an Ombudsman has refused to consider a complaint due to unacceptable behaviour of the complainant, this finding may also assist operators to dispense with the same claim if it is then vexatiously litigated.

Which claims will continue through the Courts?

Many cases will fall outside the aegis of the Ombudsman.

If claims must be brought within a short period to reflect the importance of prompt redress, tardy complainants will be left to litigate. Legacy claims arising in the 6 years prior to the introduction of the Ombudsman are also likely to be outside scope and would have to be brought as court claims. Some claims will be barred if they are valued above any cap on redress. The cap might broadly correspond to the limit on small or fast-track claims, though this would be a sufficiently high bar to bring a large proportion of complaints within the Ombudsman's reach.

The Ombudsman's jurisdiction will not extend to contractual claims or to complex or higher value claims. This is especially so where questions arise over whether the Ombudsman's resources will be sufficient to decide a matter fairly and proportionately, including where the matter will require legal counsel on both sides. If complaints involve complex or subjective assessments of harm, this may also be a matter for the courts.

The most obvious cases of complex cases would be social responsibility failings which fall outside any well-established principles and require the rigorous testing of the court. As codes of conduct evolve over time, new matters ripe for litigation may also come to the fore.

Customers will be at liberty to reject an Ombudsman's final decision and escalate the matter to litigation. In most cases, claimants will logically weight the downside cost of suing for a higher award, and will most commonly prefer to accept a lower settlement without such risk. Although it should not be possible to split causes of action between the Ombudsman and the courts, there will be cost involved in resolving the rare cases in which such claims are attempted. And finally, operators may themselves welcome the rigour of the court system in some cases. Judicial review of the Ombudsman's decisions will be available where decisions are not accepted.

Operators can expect to see a reduction in workload of those time-consuming but lower value claims in the near future, but the courts will remain the preferred or proper forum in many cases.

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M&A – Getting your gambling business ready for sale

In any sale negotiations sellers are clearly going to be heavily focused on valuation. To reduce the risk of value erosion at a later stage in the process, time is also well spent upfront making sure your gambling business is well-prepared and in a clean state for sale.

These are the key things we recommend sellers focus on sooner, rather than later, to reduce the risk of deal delay and price chips, purchase price retentions and indemnities being requested later in the process.

Corporate

Make sure your cap table, company records and corporate filings are all up-to-date and in presentable form. If you have issued share options or warrants, gather all of the signed paperwork, understand their tax impact for both the company and option holders and check that their exercise will dovetail with completion of the sale.

Technology ownership

A buyer's desire to acquire additional proprietary technology / content is often at the heart of any gambling deal. It is not uncommon to find that a business does not have the proprietary rights it thinks it does. Where development has been outsourced, check the legal agreements carefully to validate ownership and plug any gaps where necessary.

Key contracts

Be across the impact of the deal on key supplier and (on B2B deals) customer contracts. Provisions relating to exclusivity, change of control and termination need to be looked at carefully. To the extent possible, come up with a strategy upfront as to how the impact of these provisions may be mitigated if they are an issue for a buyer.

Regulatory consents

No one wants the uncertainty that a gap between signing and closing creates, so establish early on what the change of control process is in relation to any regulatory licences you hold and what impact this may have on the deal timetable.

Regulated vs unregulated revenues

Buyers will likely carefully scrutinise any material differences (both current and historical) in the regulatory risk rationale of their existing business and your business. Make sure you have firm oversight over where you are taking revenues from and, if you are a supplier, where you permit your customers to take revenues from. The lack of a coherent risk rationale will be a concern for any buyer.

Compliance

Ensure your compliance policies and procedures are meeting required standards (particularly in relation to areas such as AML, responsible gambling, anti-bribery and corruption and data privacy). The increasing complexity of regulation together with more regular and aggressive regulatory interventions means that this is likely to be a key area of diligence focus.

Brand protection

If branding goes to the value of your business or its product offering, make sure it is properly protected. Some simple checks can help uncover any major gaps in a trademark portfolio and appropriate remedial action can then be taken.

Key Talent

Retention of key talent will be particularly important for a buyer. Check your employment agreements contain appropriate notice periods, restrictive covenants and IP transfer clauses, to avoid issues coming up later in the process.

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M&A – bolt-on deals in focus

In a congested and competitive market, embracing “the next big thing” can be a key differentiator. In the remote gambling world, could the next big thing be virtual reality (VR) technologies?

The trend for mega mergers which dominated the gambling M&A landscape in recent years appears to have subsided for now – the mixed bag of success coming from such deals together with a greater scarcity of equity and debt funding has led us back to a focus on bolt-on acquisitions.

Many of the largest B2C operators have reserved their firepower for snapping up local heroes in regulated markets where the opportunity to enter a new country or bolster an existing position to get a foot on the podium has proved attractive to the likes of Entain and Flutter, particularly across Western and Eastern European jurisdictions.

For B2B suppliers, the bolt-on acquisition has always been the focus, particularly for gaming software providers who have been driven by a sustained desire to snap up innovative technology and content and to stop rivals getting a leg up via acquisition. Evolution has continued its expansion spree, but we have also seen activity on the sports betting supply chain with Kambi and GIG adding to their offering.

Unlike with public M&A deals, the bolt-on lends itself to a deep diligence dive. It has become increasingly common on these deals to get under the skin in areas such as regulatory compliance and synergies.

The proliferation of regulatory enforcement across multiple markets means a wary acquirer could easily sleepwalk into “buying” a fine with the associated scrutiny from regulators, investors and the media. Scrutiny of a target operator’s AML and responsible gambling policies and procedures (rather than just its geosplit of revenues) has become an early must for seasoned deal teams – and it isn’t just assessing the cheque which might need to be written to the regulator but also the financial consequences of adjusting those policies and procedures.

The search for synergies is not new but it can prove disruptive to the entrepreneurial spirit of the target business which drove the growth and/or innovation which made the buyer sit up and take notice in the first place. Managing the personnel is, perhaps, as key to success as managing the P&L in the short-term post transaction.

This dynamic is made all the more important with these deals typically structured with both upfront and earn-out based consideration. Success for either the buyer or sellers can rise or fall not only on achieving a balance in terms of whether the KPIs to be hit are too easy or totally unachievable, but also the contractual earn-out protections in the share purchase agreement which can run the risk of giving the sellers free reign or, indeed, hamstringing their ability to drive value and leaving them demotivated.

As bolt-on transactions continue to pervade consolidation within the sector, the winners on the buy side are likely to be those who really understood what they were getting and who could harness the talent of target management teams rather than smothering them.

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Remote Gaming Duty: common pitfalls

Remote Gaming Duty (RGD) presents challenges for many operators. Whilst RGD is conceptually straightforward, in practice its application is complex and existing HMRC guidance is inadequate, meaning that a number of grey areas exist.

As most in the sector will know, RGD is charged at a rate of 21% on profits from remote gaming played by a UK person, regardless of where in the world the provider is located.

Whilst the principle is simple, in the course of advising a number of UK operators, we have encountered common areas of difficulty which, if not managed, can lead to HMRC challenges and the subsequent assessments, penalties and interest. Conversely, there are opportunities for those familiar with the rules to manage their promotions in such a way as to limit their exposure to RGD.

Accounting for free plays

The correct recognition and reporting of free plays is a key area for most operators. Care needs to be taken to accurately account for promotions, both in terms of when a free play is required to be reported for RGD purposes and the accurate valuation of such free plays.

Treatment of progressive jackpots

Operators which operate internal and external progressive jackpots should ensure that they are properly accounting for their 'profit' in respect of such jackpots. In the case of external jackpots, operators should only be paying RGD on their 'cut' – and take care to neither over or under pay RGD as a result of incorrect revenue recognition or deducting non allowable winnings.

Player abuse

In cases of bad debt and void transactions (including as a result of fraudulent activity or other patterns of behaviour by actors designed to abuse operators' promotional bonuses) refunds from HMRC are rare. In particular, operators should ensure they have appropriate technology in place to correctly identify the location of all players, but especially 'bad actors'. Excise Notice 455a sets out at length the verification requirements operators need to abide by.

Record keeping

As HMRC seem to be increasing their compliance checks, both in terms of reach and scope, it is important that operators regularly review and, if necessary, improve their internal systems and processes in order to ensure that, in the event of an audit, they are in a good position to satisfy HMRC that good practice is being adhered to.

Reform of remote gaming taxes

This is an area of change. In the recent Autumn Statement, the government announced a consultation on proposals to simplify RGD and other gaming duties into a single tax. It is important that stakeholders actively engage with this process to ensure that any changes are workable and to avoid any unintended consequences.

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Drafting customer T&Cs in the wake of the Green v Betfred judgment

In 2021, the UK High Court granted summary judgment in favour of Mr Green, a customer claiming £1.7 million in winnings following gameplay on one of Betfred's products.

Betfred argued that it was not required to pay Mr Green because the winnings arose from a game defect, and Betfred's T&Cs excluded liability to him in those circumstances.

Betfred lost on each attempt to rely on its contractual exclusions and Mr Green recovered his game winnings in full plus interest and costs against Betfred.

In what was a seismic judgment, the court determined that:

- Betfred's exclusion clauses were inadequately worded because they were unclear and didn't fit, or clearly apply to, the particular circumstances that had arisen;
- the way the clauses were presented, and in particular the failure to properly 'signpost' them to Mr Green, meant that they weren't incorporated into an enforceable contract between Betfred and Mr Green; and
- even if the clauses were worded adequately and had been signposted and therefore incorporated into a contract, they weren't transparent or fair under UK consumer law so Betfred wouldn't have been entitled to rely on them in any event.

The judgment sent an emphatic message to the industry about the critical importance of unambiguous drafting, orderly presentation, and 'signposting' of consumer T&Cs. Simply put, if any of these factors are absent or deficient, operators can't expect to confidently rely on their T&Cs when things go wrong and, for obvious reasons, this represents a potentially material business risk.

There are several lessons to be drawn from the judgment:

- **Fairness and clarity:** Consumer T&Cs must be fair (within the meaning of the Consumer Rights Act 2015, (**CRA**)) and drafted in plain English and be understandable to the average consumer (this has long been a requirement both of operators' licence conditions and of consumer law more generally, but Green v Betfred was a timely reminder of how important this actually is).
- **Specificity:** When seeking to exclude liability, using vague 'catch-all' language (for example, the often used "malfunction voids all pays and plays") won't work. Drafting needs to be comprehensive and specific, so that its meaning is unambiguous.
- **Signposting:** Exclusions of liability (including any circumstances where the operator won't pay out) and other powerful or potentially detrimental terms need to be clearly 'signposted' to consumers if they're to stand a chance of being enforceable. This means taking additional steps to highlight certain terms to the consumer in a timely way, for example by using summary sections and/or pop-up notices.
- **Presentation:** Presentation is important (it goes towards the transparency requirements under the LCCP and the CRA), so T&Cs must be organised, formatted well, and generally easy to read and navigate.

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Football's strong appeal

Whilst it was felt that a number of ASA rulings would be necessary to fully appreciate where the line was to be drawn on 'strong appeal', the fact that ads featuring current Premier League players/managers and members of top European football teams have been found in breach of the new rule, isn't surprising.

The ASA's guidance was clear; football was considered of 'inherent strong appeal', and the use of football imagery and personalities in gambling advertising was going to be heavily impacted as a result.

What has been interesting though, is how those 'associated' with football have been evaluated. Micah Richards, Peter Crouch and Robbie Savage are not considered to have 'strong appeal' to children or young persons (**under-18s**), yet Gary Neville is.

Neville's 'strong appeal' was due to his social media following – the ASA accepted that he had been long retired from football and that his role as a Sky Sports pundit did not result in 'strong appeal'. Yet, as the guidance stated, where a person's social media following included a "significant absolute number of under-18 followers" this would likely be a strong indicator of under-18s appeal. Whilst the percentage of Neville's under-18 followers was no more than 5%, the fact that his overall following was high meant those under-18 were still significant. It probably isn't quite as simple to suggest that a total of 100,000 under-18 followers 'tips the balance' for the regulator, but it's certainly indicative.

Other points to note...

What is apparent from the rulings so far is the ASA's use of AI to proactively search for infringing ads online. Whilst it won't please operators that ads are being monitored, it should mean that those ads investigated are from a broader range of operators and that the risk of competitors acting as consumers is less prevalent.

New advertising guidance on "alcohol alternatives" comes into force in May, effectively ensuring that the rules applicable to ads for alcoholic drinks will apply to a number of alcohol-free alternatives – for example, where the products share the same brand name. Whilst we have always been of the view that ads for free-to-play products should comply with the gambling rules, given that broadcast ads for alcohol includes a similar 'strong appeal' prohibition, it is worth noting the ASA's approach here.

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Sports sponsorship deals – game on?

Sponsorship by the gambling industry provides a significant source of income to sports teams, clubs and events.

While the government has always been clear that sporting bodies must consider their responsibility to fans' welfare, it has equally recognised their right to benefit from commercial deals. Fortuitously for sporting organisations and gambling operators alike, this position was affirmed in the White Paper. With a "lack of conclusive evidence on the relationship between advertising and harm" and the Gambling Commission's own research identifying that sponsorship has "comparatively little impact on behaviour", it is reassuring that, while the White Paper sets out a stricter approach to gambling advertising in respect of potentially harmful practices, it does not propose legislative amendments to ban or curtail sponsorship deals.

Instead, there will be a Code of Conduct to provide "meaningful improvements" in the social responsibility of gambling sponsorships while promising flexibility between the various sports. The detail, along with how the Code will achieve the balance between tackling 'harm' and protecting valuable revenues for sports teams, remains to be seen.

Despite the Premier League's voluntary removal of gambling sponsorship from shirt fronts (effective from the end of the 25/26 season), to focus on this impending ban distracts from opportunities available to gambling operators. Not only is the Premier League clubs' shirt-sleeve and LED inventory unaffected, a key focus of the White Paper is on reducing gambling-related harm, which provides operators with an opportunity to get creative with their sponsorship, focusing on safer gambling messaging and community initiatives, rather than mourning the footballers' chests that could have been.

Sport gives fans a sense of community and togetherness; this is something into which gambling operators could channel their marketing resources. Supporting age-appropriate community engagement by investing in safer gambling or wellness initiatives in partnership with a sponsored sports club could be a valuable exercise in terms of making a genuinely positive impact and differentiating that operator from its competitors.

Consequently, gambling operators have an exciting opportunity (pending anything to the contrary in the Code and always caveated with a robust exit clause) to score a hattrick with their sponsorship activity: (1) effectively publicise safer gambling tools to those at risk of harm; (2) benefit those sports who depend on the revenue and the fans who depend on that sport's survival; and (3) distinguish themselves in a crowded marketing environment.

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Gambling ads on TV – which rules apply?

Prior to Brexit, broadcasters in the UK were following EU rules in connection with the distribution of audiovisual media.

The AVMS Directive provided for a country of origin principle: if an audiovisual service was established in one Member State, it could be distributed throughout the EU following the rules of its 'country of origin'; importantly, re-transmissions of the service could not be blocked. Though TV broadcasters have sought to rely on this freedom when transmitting television services throughout the EU, even in countries where gambling advertising was not permitted, there have been a number of cases which debate how a restriction of gambling advertising within the re-transmissions could be justified on the ground of consumer protection.

Of course, the debate over what gambling-related promotions can and cannot be lawfully shown on TV (or lawfully blocked, as the case may be), is not just important for broadcasters and ad-sales houses in respect of broadcasters' commercial inventory, but also for gambling brands as they seek to be included within sports-programmes themselves. The sale of a range of sponsorship inventory is typical and common across sports properties, yet what analysis is done regarding gambling-related branding within a television programme and whether or not this constitutes a commercial reference or invokes any product-placement rules? Whose responsibility is it to ensure that no rules are broken and what due diligence and contractual protections are needed to share risk of non-compliance?

As sports producers start to engage in more innovative production styles and incorporate interactive elements, considering this is even more important. Partnerships between producers and betting operators to include branding or even functionality within sports coverage might seem like a match made in heaven, yet there is a lot of regulation to consider. The fact that this is different across the UK, the Member States and further afield, and the truly global appeal of sport means these regulatory considerations are often required on a worldwide basis.

As the gambling regulators tighten the screws on permitted gambling advertising on television, producers / broadcasters and operators will find other ways to market their products and services. But it is worth remembering that whilst a new marketing idea might seem ground-breaking, it may have already been considered, it's just that broadcast regulation doesn't permit it.

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The White Paper and data protection

As sure as night follows day, consultations will follow the White Paper.

The Gambling Commission has already had consultations on direct marketing, financial vulnerability, remote game design, and age verification following the White Paper. Readers of the Front Runner (click, like and subscribe) will be aware of our thoughts on each of these so far. These consultations are, however, only just the beginning.

One trend we noticed through 2023 was how intertwined many of the Gambling Commission's proposed updates to the LCCP were with data protection. This is not entirely surprising given that so many areas of regulation involve significant, and potentially high-risk, processing of personal data – including financial checks, data sharing, and identifying markers of harm. What is noticeable, however, is that the Gambling Commission appears to be increasingly willing to discuss data protection within its proposals. A prime example of this was the Gambling Commission's consultation on direct marketing – an area of law that is currently regulated by the ICO, the UK's data protection authority – and the prescriptive proposals drafted by the Gambling Commission.

It is certainly wrong to suggest that the Gambling Commission shouldn't be mindful of data protection issues (they absolutely should), however operators must always remember that it is they who are responsible for data protection and that their obligations under data protection run concurrently to gambling regulation and cannot be superseded by the Gambling Commission.

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To this end, we would remind all operators to seek data protection support when reviewing consultations and considering how best to respond to the consultations.

Some may recall the Gambling Commission's guidance around SR Code 3.4.3 (11) – which involved reviewing automated processes and spotting markers of harm. There was a suggestion in the proposed guidance that 3.4.3(11) was consistent with data protection laws, however it seemed that operator DPOs took a different view and data protection became a theme in the responses to the consultation. Ultimately, the guidance was amended, at least partly, on the basis of the data protection feedback.

This example serves as a good reminder of why operators should involve their data protection personnel and advisors in responses to consultations. It also serves as a good reminder that data protection must always be considered alongside LCCP requirements where personal data is involved.

Data protection implications of the Single Customer View

What is the Single Customer View?

The Single Customer View (SCV) is an initiative designed to protect customers by operators sharing information on customers who exhibit certain markers of harm. A trial of the SCV went live in February 2023 with a handful of large operators sharing certain information into a central system, GamProtect, which will prevent the other participating operators from providing services to any customer who has been flagged to GamProtect. The intention is for additional operators to sign-up to the SCV.

What are the challenges?

There are obvious technical challenges with the SCV, but there are also legitimate concerns about the implications for personal freedoms and privacy. As such, the SCV took part in the ICO's 'Regulatory Sandbox' from November 2020 to 2022 in order to assess the data protection challenges posed by the SCV, including establishing whether there was a lawful basis under the UK GDPR for sharing behavioural data between online gambling operators via the SCV.

Utilising the SCV service in compliance with data protection laws

Whilst the ICO has passed comment on the SCV, there remain many data protection challenges for participating operators and future participating operators to consider, such as data protection impact assessments, legitimate interests assessments, transparency, rights requests relating to the SCV, security of the data and dealing with those that challenge the results of the SCV.

One area that we believe can be easily overlooked – but which will be vital to the SCV and data protection compliance – is managing customer records.

When a customer is flagged by a participating operator and shared with GamProtect, it is critical that operators keep a clear record of when the customer was flagged and why (as well as including relevant evidence, such as emails with the customer or documented calls with the customer).

Under the SCV, customers will have the right to contest being blocked by participating operators. This information is not stored within GamProtect, meaning that such customers will be redirected back to the participating operator that first closed the customer's account and shared the information with GamProtect. Those operators tasked with considering challenges from customers will be required to reconsider the evidence to determine whether or not the customer was correctly blocked. No doubt, these challenges may often be accusatory in nature and, as well as having to manage the customer, operators will be under time pressure to consider the case and respond.

To this end, clear instructions to all customer support and safer gambling teams on how to document and file cases where customers are added to the SCV will be vital. And, of course, it is a data protection requirement that operators are able to demonstrate how they comply with the UK GDPR, which will include decisions made about customers who are shared with GamProtect.

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Emerging tech and gambling – the threats and opportunities of AI

For a sector so dependent upon the collation and interpretation of data assets, as well as deployment of technology, the opportunities and challenges presented by artificial intelligence – or, more accurately, machine learning – are potentially game-changing.

Whether the aim is to provide a greater, more tailored user experience through the use of generative AI tools to create more personalised, promotional material, or to use analytical AI to drive greater insights through real time and deeper analysis of data sets, this particular frontier technology cannot be ignored.

At all stages, however, there is a need for operators to understand the technology, appreciate how risks can be mitigated and how systems can be optimised to create a competitive edge.

Critically, it is important that any deployment of machine learning is underpinned by an appreciation that the technology is based upon analysing and interpreting data to find statistical correlations. The integrity and provenance of the data is paramount and care needs to be taken to ensure that algorithms are interpreting appropriate data sets.

Data obtained from open sources, whilst more cost effective, may create privacy and security concerns. This could lead to personal data or financial information existing within data sets and then forming part of the statistical analysis, thereby creating potential risks for individual customers.

On the other hand, reliance upon closed sources (for example data held exclusively by the operator) – whilst safer from a security and privacy perspective – has the potential to amplify correlations and perceived behaviours, which in extreme examples might reinforce the very characteristics that operators are required to address as part of their safer gambling obligations.

As with all things in life, context is key. Understanding precisely how a data set has been assimilated or obtained – and what data points have been included and, crucially, excluded – prior to it being interrogated by some algorithm will offer the greatest insight to the accuracy of any output and the extent to which it can be relied upon to make predictions, for example fixing odds.

Over the coming months regulators and legislators in the UK, EU and US alike will promulgate further rules and laws to govern the manner in which machine learning technologies can be deployed and what safeguards are required as we navigate the path to unlock safely the power of this emerging technology.

AI and machine learning undoubtedly has a significant value proposition for the betting and gaming industry. However, its role needs to be understood; its use needs to be targeted; and its potential risks need to be appreciated and mitigated.

Whether it will be truly game changing is ultimately in our hands.

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The convergence of betting and media: The direction of travel

Betting services offering live streaming of sports events to their customers is nothing new. In fact, Wiggin advised Perform Group on the first iteration of their Watch&Bet service for online betting operators in 2007. At around the same time, Sky Bet was starting out on its success story after the purchase of 365 Media Group by BSkyB in December 2006.

In short, convergence of sports is nothing new but what we have seen from our traditional betting operator clients over the last 12 to 24 months is a greater desire for rich content (whether video, data or editorial) and requests for additional functionality and features from their streaming providers and commercial partners. This, in turn, requires greater flexibility and planning by rights holders as they weigh-up these additional rights requests against the exclusivity and other protections they have granted their primary global broadcast partners. It seems a natural progression for online betting services to want to offer a more engaging and stickier betting experience but the traditional media giants who have paid many millions for exclusive live rights will be wary of betting services becoming competitors for eyeballs and dwell time.

Putting aside regulatory challenges, betting and media have worked together to create partnerships and commercial opportunities for a number of years, notably with Virgin Bet launching in 2019 (subsequently consumed by LiveScore, itself a success story in the converging landscape) and TalkSport Bet launching in 2022. Indeed, the leaders in the US, FanDuel and DraftKings, started life as fantasy sports offerings, gathering fan appeal. Both have also sought to expand their audio-visual offerings by jumping on the FAST channel bandwagon, seeking to expand their brand appeal and diversify revenue streams with programmatic advertising and a richer subscriber data set.

Conversely, last year also saw the most obvious convergence to date with a very established sports broadcast brand (ESPN) and disruptor (DAZN) seeking to leverage their sports offerings by offering a betting experience in conjunction with their content offerings. This trend of a more fan- or consumer-centric approach is nothing new in the wider sports ecosystem and it will be very interesting in 2024 to see how these new entrants can disrupt the status quo.

Given the typical habits and wish-lists of sports fans, combining media and betting is an obvious and exciting direction of travel, offering coverage, analysis match-reports, statistics and the opportunity to bet under a single brand. However, what is not clear is, on the one hand, how broadcasters and publishers (and, by extension, rights holders) will react to any encroachment on their viewing numbers and, on the other, how successful traditional broadcaster brands will be in converting consumers of content who will likely have one or more betting accounts with an established operator to be a loyal betting customer.

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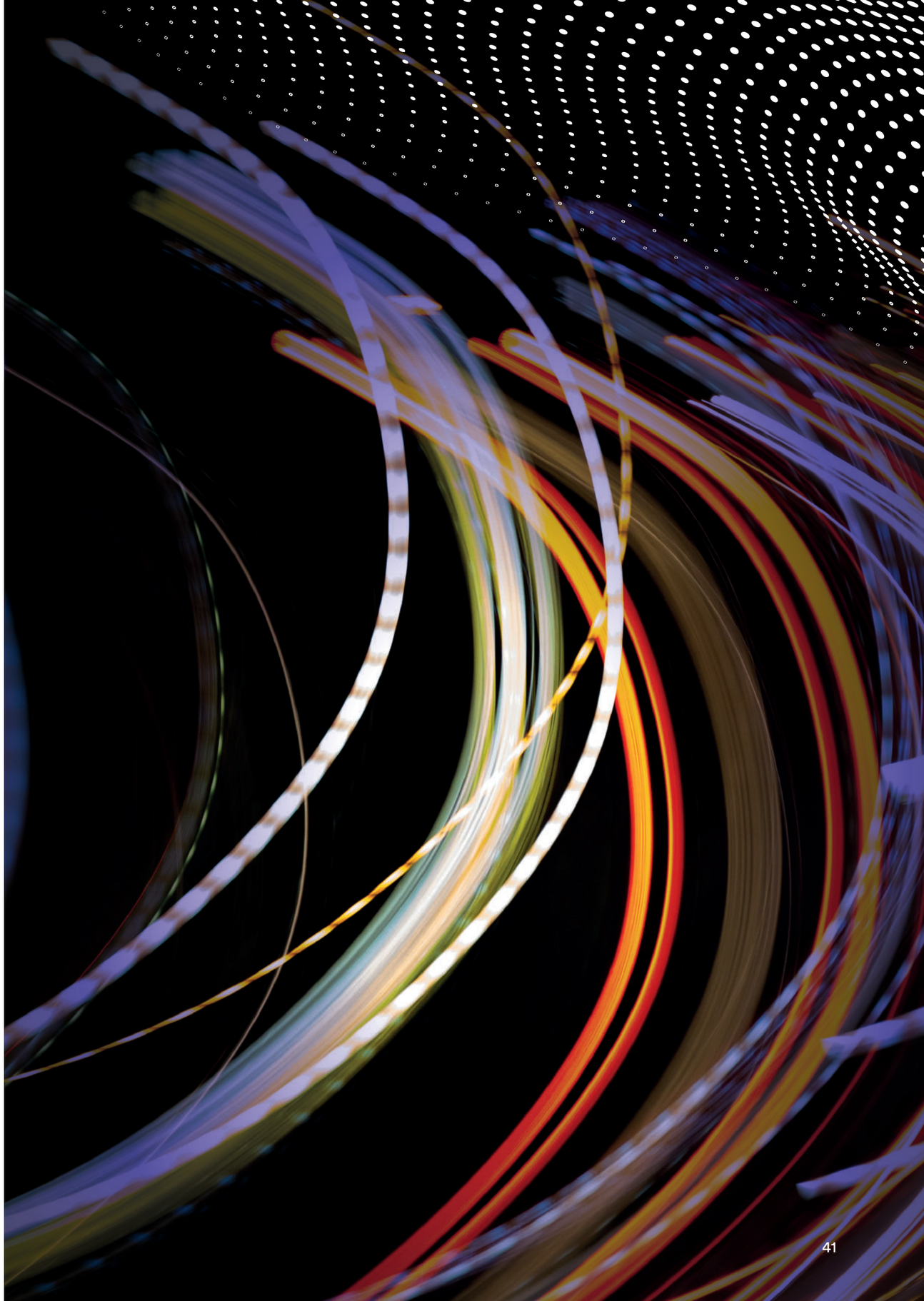

Are we ready to gamble in the metaverse?

In a world where the Gambling Act 2005 dates back to before cryptocurrency, blockchain and virtual reality existed, is the gambling industry prepared for the challenges presented by the metaverse?

The metaverse is still a developing technology; the most widely accepted definition of the metaverse is a "virtual-reality space in which users can interact with a computer-generated environment and other users".

Unlike traditional online casinos in which customers play games on their phone or over a screen, the metaverse attempts to replicate the full casino experience. Customers can walk through a casino and experience a digital representation of the environment using a unique avatar. It is expected that customers will be able to control their avatar's behaviour in a similar way to how they conduct themselves in the real world. Avatars will become the customers of tomorrow.

It is widely regarded that gambling in the metaverse will occur via the exchange of cryptoassets as payment for opportunities to gamble. The anonymity surrounding cryptocurrency has proved problematic as operators are unable to provide adequate source of funds in relation to cryptoassets which, in turn, carries a higher risk of money laundering.

The Gambling Commission has highlighted a number of regulatory risks that arise from accepting cryptoassets directly, such as (i) how fluctuations compared to fiat currency will be dealt with (this is likely to affect important thresholds, such as responsible gambling tools and AML triggers); (ii) how customer funds will be treated in the event of insolvency (this was highlighted during the FTX scandal); and (iii) what information has been provided to consumers to ensure they are aware of the risks associated with using cryptoassets as a payment method.

Until the use of cryptocurrency becomes genuinely accepted by the Commission, licensed operators will struggle to operate in the metaverse.

The legal challenges around the metaverse and how consumers are protected start as soon as the software is developed and released into the metaverse. If software developers have no control over the virtual environment, then who will take responsibility for illegal activity in the metaverse? How will customers be protected from illegal activities such as theft and identity fraud, and how will marketing material be communicated to customers in this virtual world? How will operators ensure that they have appropriate measures in place to identify and act when customers exhibit harm?

Operators need to pay particular attention to their terms and conditions and marketing communications to ensure customers are protected and that all relevant material has been carefully communicated to them prior to entry into the metaverse. How will existing customers of an operator be informed of the new gambling world that occurs in the metaverse?

In the metaverse, where anonymity is more prominent, there is the potential of easier accessibility to children participating in gambling-related activities. The gambling sector must protect children, young persons and other vulnerable persons from being harmed or exploited. Until there is guaranteed protection of these individuals, we will never be ready to gamble in the metaverse.

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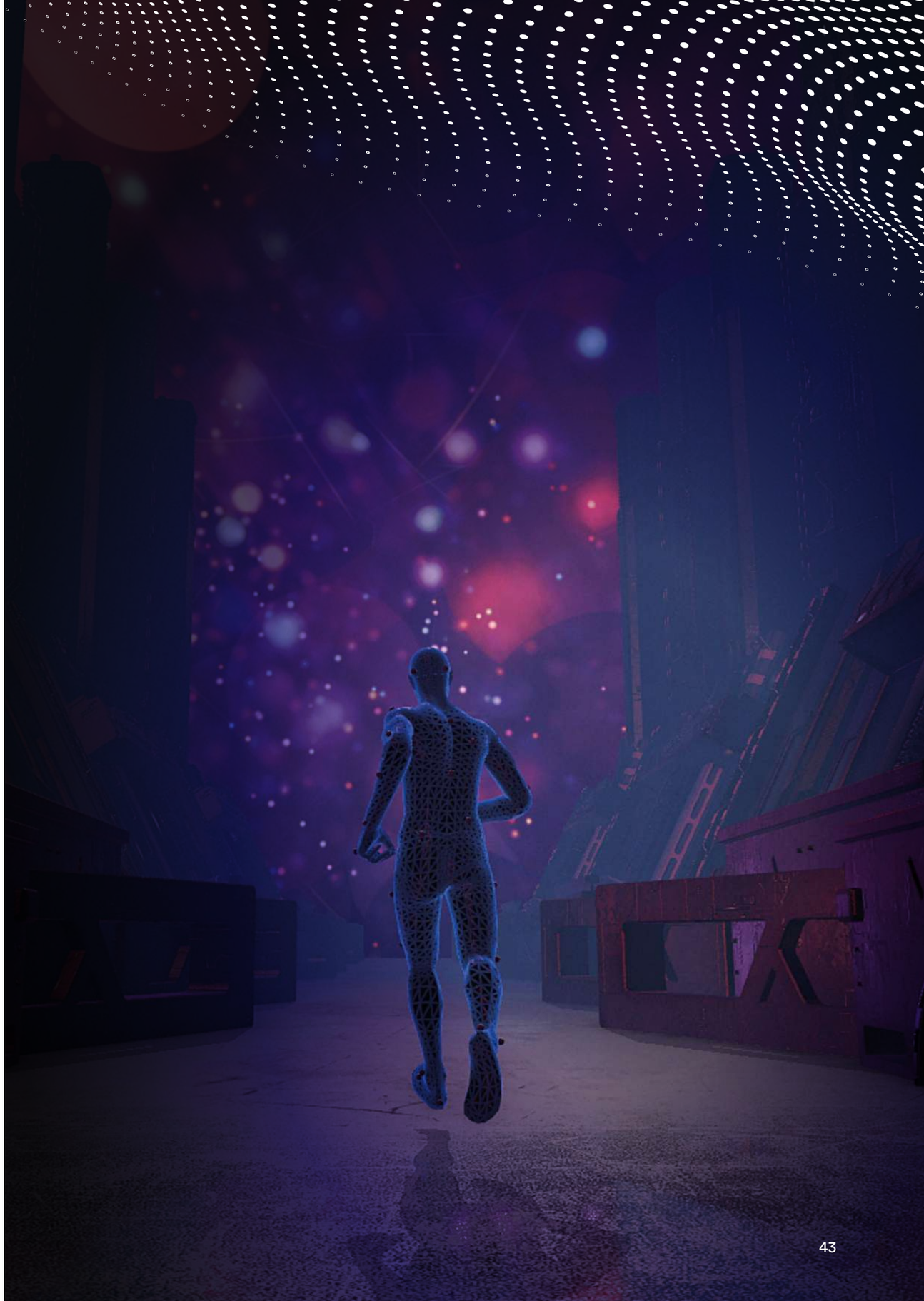

Protecting the technology that powers online games

Whilst a strong brand and presentation will help to draw players in, ultimately it is the end user experience of an online game that dictates whether they come back for more.

A significant factor in ensuring that a game is engaging and, crucially, fun to play is the backend technology that powers the game and the platform from which it is made available. Indeed, this technology, as well as the principles and know-how underlying it, may in many cases represent one of the most valuable assets of an online gaming business. Having a clear understanding of how IP rights may be deployed in order to help protect and extract the maximum value from them is therefore critical.

The software that delivers an online game will typically be protected by copyright. In the UK, copyright arises automatically at the point that a work is created and without the need for registration. Moreover, copyright works created by employees will generally be owned by the employer. These are all helpful factors for an online games business looking to protect its software from those that may seek to copy it. However, the position can quickly become more complicated if a close eye is not kept on ensuring that such rights are managed properly. For example, where a software developer is engaged on a contract basis, under UK law it is the developer - and not the engaging business - that will be the owner of copyright in the code created, unless an express assignment of those rights is granted. It is remarkable how many businesses assume that they own all rights to the code created for them by third party developers, only to find out at the point of trying to enforce, commercialise or even sell such rights that they do not. The use of open source (OS) code during the software development process can also add an additional layer of complexity where copyright is concerned, unless clear policies and records relating to the use of OS components are developed and monitored regularly.

Often, it is the underlying principles or mechanics that the software delivers that represent a true commercial differentiator. Whilst ideas ‘as such’ are generally not protected by copyright, patent protection may be available where inventive ideas have been developed to the point of being capable of deployment.

A look at the patent registers around the world demonstrates that in many jurisdictions the historic prejudices against allowing patent protection for software-implemented inventions are falling away, and there is plenty of evidence of online gambling businesses taking advantage of the patent system to either prevent competitors replicating innovative mechanics or processes, or to access additional revenue streams through the licensing of patented technologies.

Taking advantage of rights protecting the misuse of confidential information and trade secrets is another way that an online gambling business might seek to protect valuable and innovative know-how. However, in order to be confident that such rights will be available when needed requires a careful and joined-up approach to both the contractual and practical measures taken to safeguard commercially sensitive materials.

In summary, there are a variety of ways that it may be possible to protect the back-end technology that powers an online game. However, developing and executing a clear and appropriate IP strategy is critical to ensuring that it is possible to both protect and maximise the commercial opportunities represented by such technologies.

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Whistleblowing – have the stakes ever been higher?

There has been considerable volatility in the employment landscape in recent years.

The global disruption from Covid has helped embed remote and hybrid working practices that would otherwise likely have taken decades, whilst macro-economic pressures have led many businesses to restructure and refocus. This melting pot of change has, based on our recent experience, resulted in a much more litigious employment environment. The remote gambling industry has not escaped these issues, with signs suggesting that whistleblowing will be the battleground of choice for potential claimants in this sector.

The UK has robust and long-standing laws that safeguard employee whistleblowers. Should an employee report what they believe is a malpractice or wrongdoing to their employer or a relevant regulatory body, the law protects them from retaliation for such disclosure. This protection can empower individuals to step forward and report issues they perceive within their employer, with such protections being weaponised by employees who have general workplace grumbles.

Despite the protection the law affords whistleblowers, litigation in this area is never straightforward. The law is complex and there are numerous hurdles a claimant must overcome in order to establish that their disclosure is 'protected'. Whilst this can provide useful opportunities to defend claims in this area, fighting such disputes is rarely attractive. Employment litigation is now far slower and more expensive, with limited opportunities to recover legal costs. Significant damage has also often already been caused long before cases reach a trial, with workplace disruption commonplace and the mere inference of improper conduct likely to trigger unwanted media attention.

The highly regulated and politically charged nature of the gambling industry means that it is particularly susceptible to whistleblowing risk. Employees may feel a heightened moral responsibility to disclose information, or simply understand the power they can wield by making, or threatening, a disclosure. Potential compensation in whistleblowing claims is uncapped, while the consequences of regulatory non-compliance can be even more severe, ranging from financial penalties to the revocation of operating licenses and considerable reputational damage. We have first-hand experience this year of such issues affecting our clients in this sector.

It's crucial therefore that appropriate measures are taken to mitigate these risks. For example, whilst there is no legal requirement for UK businesses to implement a whistleblowing policy, policies that ensure disclosures are reported through proper channels and responded to consistently can prove very beneficial.

Navigating whistleblowing challenges requires a combination of legal awareness, ethical considerations, and proactive measures to foster a culture of transparency and accountability. Companies that successfully address these factors will be better equipped to navigate the risks posed by whistleblowing and uphold their reputation and regulatory compliance.

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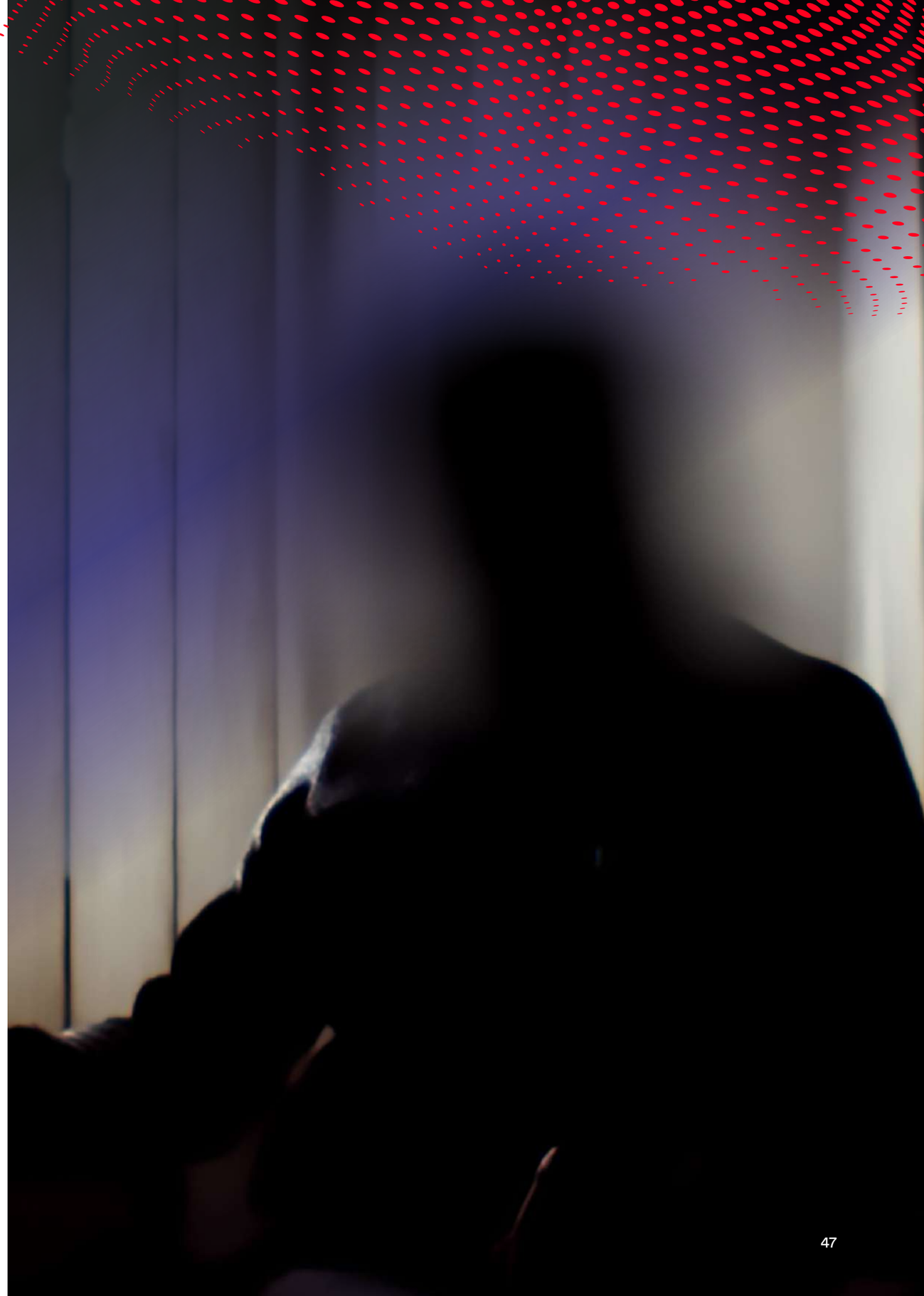

Engaging global talent in the UK - the illusion of choice?

Remote gambling businesses are invariably multi-national, either in a straightforward organisational sense, or with respect to the markets they operate in. Immigration considerations are therefore of increasing concern, particularly given the never-ending political focus on curbing net migration levels.

There are a bewildering range of visa routes within the UK. The Global Business Mobility (GBM) route, for example, has an array of sub-categories. Yet migration statistics reveal that of the wide variety of different immigration routes, some are used seldomly.

For those GBM sub-categories, in the first half of 2023 there were visa grants to 11 Scale-up Workers, 14 Service Suppliers, 23 Secondment Workers and 259 Graduate Trainees. The main subcategory, Senior or Specialist Worker, had 8472 grants. Half of those grants were to Indian nationals, with the rest spread broadly across other nationalities.

By comparison the Skilled Worker visa route had 32,857 grants in the first half of 2023 (not accounting for grants under this route for roles in health and social care which numbered over 80,000). Those figures might change significantly in 2024, given the government's recent announcement of a significantly increased minimum salary threshold for Skilled Workers to £38,700.

The statistics are revealing because for each of the minimally used GBM routes referred to above, there are complicated underlying rules and policy. Is it really worth the effort to explore them? The statistics suggest that many businesses are simply ignoring those options. Could gambling operators be missing a trick in this area? The short answer is probably not.

The diligence required to explore the GBM routes is often not cost-effective. There are specific situations where it might make sense to use a GBM route, for example intra-company transfers to the UK from EU states, which enjoy an exemption from the Immigration Skills Charge, but there is often limited real world justification.

The permitted intra-company activities for visitors have recently been expanded, allowing a visitor to the UK to work directly with clients on a project being delivered by the UK branch, so long as "the employee's movement is in an intra-corporate setting and any client facing activity is incidental to their employment abroad".

With that expansion of the permitted activities for visitors, and the ease with which many visitors can now enter the UK using an e-gate, it's increasingly difficult to justify the use of anything but the Skilled Worker or Visitor route for gambling businesses, and use of the GBM routes is likely to further wither.

The key takeaway is that the UK's array of immigration routes is not a well-ordered offering of complementary options, but a confusing hotchpotch of routes, which often reflect changing priorities, international treaty obligations, and sometimes simply policy spin. Cogent professional advice should clearly set out this global mobility landscape for gambling businesses, enabling appropriate focus to be placed on the most pragmatic solutions.

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