The Council's response to the Gambling Commission's summer 2023 consultation on proposed changes to Licence Conditions and Codes of Practice (LCCP), Remote Gambling and Software Technical Standards (RTS), and arrangements for Regulatory Panels

Improving consumer choice on direct marketing
Proposed new provision
Applies to: All licences

SR Code - 5.1.12 - Direct marketing preferences
Licensees must provide customers with options to opt-in to direct marketing on a per product and per channel basis. The options must cover all products and channels provided by the licensee and be set to opt-out by default. These options must be offered as part of the registration process and be updateable should customers' change their preference. This requirement applies to all new and existing customers.
Channel options must include email, SMS, notification, social media (direct messages), post, phone call and a category for any other direct communication method, as applicable.
Product options must include betting, casino, bingo, and lottery, as applicable. Operators must make clear to customers which products they offer are covered under relevant categories.
Where an operator seeks an additional step for consumers to confirm their chosen marketing preferences, the structure and wording of that step must be presented in a manner which only asks for confirmation to progress those choices with one click to proceed. There must be no encouragement or option to change selection; only the option to accept or decline their selection.
Customers must not receive direct marketing that contravenes their channel or product preferences.

11. *To what extent do you agree with the proposed new requirement relating to consumer choice and direct marketing?*
Strongly disagree

12. *Please give your reasons for your answer below.*
The Commission explains that the reason for this proposal is "To provide both new and existing gambling consumers greater control over the marketing they receive and reduce the risk of harm associated with incentivising customers to gamble on additional products which are likely to be of higher risk. We want to extend the principles of the Privacy and Electronic Communications Regulations (which require a very high bar, and granular level, of consent to send direct acquisition e-marketing) to new and existing customers."
PECR regulates the use of electronic communications in marketing, so those requirements already apply to electronic marketing of gambling products, just as they already apply to the electronic marketing of any product. The effect of the Commission's proposal is to extend the principles of PECR beyond electronic marketing of gambling products, to any means of marketing gambling products to customers. The consequences of the proposal would be to erase all existing consents to marketing held by operators, and to impact other fundraising streams used by charities who have a society lottery licence.
The Council's response will deal with 3 issues: why the proposed changes appear to cut across existing data protection law in the UK; why, if the Commission intends proceeding with these proposals, lottery operators should be exempt if the only gambling product they offer is

lotteries; and the practical consequences of imposing such a requirement on the lotteries sector.

1. **Why the proposed changes appear to cut across existing data protection law in the UK**

The UK GDPR sets out six available lawful bases for processing data. The ICO states that "No single basis is 'better' or more important than the others" (https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/lawful-basis/a-guide-to-lawful-basis/). Their guidance about the lawful basis for direct marketing at https://ico.org.uk/for-organisations/direct-marketing-and-privacy-and-electronic-communications/sending-direct-marketing-choosing-your-lawful-basis/#:~:text=You%20must%20have%20a%20valid,are%20consent%20and%20legitimate%20interests states, "The two lawful bases most likely to apply to sending direct marketing messages are consent and legitimate interests".

The effect of PECR is that, apart from a few exceptions, specific prior consent is required in order to send marketing electronically to someone in the UK. By extending the granular consent required under PECR to apply to all marketing, not just electronic marketing, the Commission's proposals would exclude legitimate Interest as a lawful basis for non-electronic marketing in relation to gambling products in the UK. This would cut across the existing data protection framework which is not sector-specific.

In addition to extending the requirements of PECR into non-electronic marketing for gambling products, the effect of the Commission's proposals would also be to extend the granular consent requirements of PECR even where the regulations themselves provided for exemptions. For example, PECR requires that where direct marketing is carried out by means of live telephone calls to recipients who have not registered with the Telephone Preference Service, consent to such direct marketing by telephone is not required. Under the Commission's proposals, however, consent would in future be required for such live direct marketing calls to customers.

Such extension of the data requirements in respect of the charity sector would seem to run contrary to the direction of travel set out in the Data Protection and Digital Information (No 2) Bill currently going through Parliament (https://publications.parliament.uk/pa/bills/cbill/58-03/0314/220314.pdf), section 86 of which would extend the ability of charities to use electronic mail for the purposes of direct marketing under Regulation 22 of the PECR. The Commission proposes the complete opposite of this Bill.

2. Why lottery operators should be exempt from the proposed requirements if the only gambling product they offer is lotteries

If the proposed SR Code 5.1.12 is introduced, the Council strongly urges the Commission to exempt from these requirements operators if the only gambling product they offer is lottery products. There are two key reasons for such an exemption.

(a) The Commission states that it is considering these new requirements to "... reduce the risk of harm associated with incentivising customers to gamble on additional products which are likely to be of higher risk." It also states that "... consumers who sign up to one product, very quickly receive offers for riskier products, such as casino games".

The 4 product options mentioned in the consultation are Betting, Casino, Bingo and Lottery. There is plenty of evidence that, of these, lottery is the lowest risk product. For example, the Commission's own guidance to licensing authorities at https://www.gamblingcommission.gov.uk/manual/guidance-to-licensing-authorities/the-gambling-product-what-are-the-issues-higher-risk-products states that "Activities with high event frequency are likely to be the most attractive. As a result, online slots, casino and bingo are higher risk."

The lower risk profile of lotteries is why the Commission has already granted various exemptions within the LCCP for lottery operators, and further exemptions for those not

offering instant win or high frequency lotteries.

If the only gambling product offered by the operator is lottery products, there is no corresponding risk of marketing from that operator encouraging gambling on higher-risk products – betting, casino and bingo. The operator would only be seeking to market their relevant lottery product. This being the case, removing the ability of such operators to rely upon legitimate interests as a basis for marketing, in circumstances where this is entirely lawful under the existing data protection legislation, would seem wholly disproportionate to the harm which the proposals are seeking to address.

The Council therefore requests that lottery operators are exempted from these proposals where the only gambling product they offer is lotteries. There seems no reason to remove legitimate interest as a basis on which such lottery operators can market in order to help raise funds for good causes. No longer allowing society lottery operators to undertake non-electronic marketing based on legitimate interests, whilst still allowing the National Lottery to market based on legitimate interest, would also seem to create an unjustified inconsistency. The Commission's proposals may be appropriate where there is a risk of cross-selling higher risk products. However, where this risk is not present, the extension of PECR requirements to marketing using non-electronic means does not appear justified in relation to the harm which the proposals are seeking to address.

(b) Unlike other gambling products, the Gambling Act 2005 requires a link between lotteries and good causes – at least 20% of the ticket proceeds must go back to the good cause promoting the draw (s99(2)). The sector average is over 45% (https://www.gamblingcommission.gov.uk/statistics-and-research/publication/industry-statistics-november-2022). Given the link between lotteries and good causes, the Commission understandably requires operators to explain to customers how much money is going to good causes and how it is being used (https://www.gamblingcommission.gov.uk/licensees-and-businesses/guide/information-to-lottery-players-proceeds-and-prizes), including examples of those receiving any grants.

Marketing as set out in the ICO Direct Marketing guidance (https://ico.org.uk/media/1555/direct-marketing-guidance.pdf) has a wide definition. Paragraph 44 states, "Direct marketing is not limited to advertising goods or services for sale. It also Includes promoting an organisation's aims and ideals." The ICO's example at paragraph 46 makes it clear that messaging promoting the work of a charity would fall within the definition of marketing. In accordance with the Commission's desire for consumers to be informed about where lottery proceeds are used to help good causes, lottery operators may write to customers to update them about the good causes which have been supported through the proceeds generated by the lottery. At present, such communication about good causes is likely to fall within the ICO's broad definition of "marketing", this can lawfully be done under Legitimate Interests. Under the Commission's proposal, this would no longer be possible, unless the consumer had already got in touch with the operator to update their preferences to receive postal marketing. It seems likely that significant numbers of consumers will not bother responding to the request to update their marketing preferences, meaning they would no longer be able to be sent information about the good causes being funded through their lottery tickets.

A further challenge which the proposals would present for the lotteries sector again arises due to the link between that sector and good causes. For some charity lottery operators, the operation of the lottery will only be one of the ways in which they seek to fundraise for that charity. They might, for example, also seek donations in addition to operating the lottery to generate funds for their charity. At present, they will often be able to undertake non-electronic marketing for their charity by relying upon Legitimate Interests as a lawful marketing basis. If the Commission's proposals were to apply to them, the practical impact would be to remove legitimate interests as a lawful basis for such non-electronic marketing,

even where such marketing was not actually about the lottery. This is because practically speaking it is likely to be very difficult (as well as confusing for consumers) to set up sufficient systems to separate the granular consent preferences in relation to lottery marketing from other general non-lottery marketing undertaken by the charity. In short, if by default as a result of customers not responding to the communication from the charity asking them to update their preferences (which as mentioned below would need to be sent by post to the charity in order not to breach PECR, causing increased expense for the charity) no lottery-related marketing is allowed, a charity is likely to be concerned about the lawfulness of sending any non-lottery related marketing. It also seems likely to be confusing for customers to have different sets of data rules applying in relation to marketing communications from the same charity, depending on whether they are lottery or non-lottery related marketing.

Were the Commission's proposals to be implemented in respect of the lotteries sector, charities running lotteries are likely to need to invest in updating/creating new data preference and consent tracking mechanisms to comply with the specific requirements applicable to lottery marketing but not other marketing. Given the effect of the proposals is to re-set everyone at no consent to marketing, and to remove legitimate interest as a lawful basis for non-electronic marketing, it seems inevitable this will result in reduced income for charities both in respect of the lotteries run by them, and potentially their wider fundraising efforts.

The lotteries sector differs from the majority of the gambling sector because it Is primarily a form of charitable fundraising rather than carried on for commercial gain. Restrictions on the ability of licensed lotteries to market are also, therefore, in effect restrictions on the ability of charities to raise funds.

3. Implementation in relation to the lotteries sector

The costs of implementing the Commission's proposals in the lotteries sector are likely to be considerable. Given the link to good causes and fact many of the lottery operators are themselves charities, this seems likely to impact on their funding to good causes.

The Commission states that “we are proposing that, if introduced, licensees must direct customers to the webpage or area of the site/app where they can decide to opt in to offers or not at the first opportunity after implementation date, for example upon next login. By default, the options should be set to opt-out (not pre-ticked). The marketing options must be updateable should customers change their preference. If the proposal becomes a requirement operators will be given time for implementation during which they will be able to invite customers to update their preferences in time for the go live date.”

The suggestion to refer customers to an area of the website where they can update their marketing preferences after their next login, envisages a level of active account management by the player common in other types of gambling, but which is not necessarily commonplace in lotteries. Although, in much of the gambling sector, customers may login into accounts to gamble, in the lotteries sector, many consumers simply buy tickets (for example through a subscription) rather than logging into an online account which they hold with the lottery operator. The effect of this difference is that it is much less likely in practice that customers in the lotteries sector would actually update their marketing preferences from the default “off” setting. They would not see messaging encouraging them to update their preferences when logging into their accounts, as they are unlikely to be often logging into accounts. The result of this would be less funds raised for good causes.

Therefore, the way in which lottery operators would need to interact with players to inform them their marketing preferences had been re-set to "none" and ask players to update this would pose challenges in respect of practical implementation. The ICO made clear in the FlyBe case (https://ico.org.uk/media/action-weve-taken/mpns/2013731/mpn-flybe-limited-20170320.pdf) that operators cannot contact customers electronically asking them to update their marketing preferences unless the customer has already specifically consented to

receiving electronic marketing. This is because the request to update preferences itself constitutes marketing, for which PECR requires specific consent. Lottery operators would therefore need to write by post to all existing customers in advance of the licence condition coming into force asking them to update their marketing preferences, at considerable cost. It is also likely to be confusing for any players who have already informed operators they do not wish to receive marketing to receive correspondence asking them to update their marketing preferences. Those who have already indicated they do not wish to receive marketing may well view such correspondence as itself being an apparent disregard of their interests.

As the effect of the Commission's proposal is to remove legitimate interest as a lawful basis for non-electronic marketing, operators (including charities in the lotteries sector) are likely to need to invest in enhanced consent management toots to try and accommodate these new requirements. In relation to people signing up to play lotteries by telephone, increased expense will be incurred through needing to discuss and detail the granular consent for each communication option on the telephone calls, otherwise operators would need to set the consent for those joining to "none".

13. *To what extent do you agree with the proposed change that customers should be presented with options to opt-in to gambling marketing on a channel basis (email, SMS, notification, social media, post, phone call, any other direct communication method)?*
Strongly disagree

14. *Please give your reasons for your answer below. Are there any options that are missing?*
See response to Q12 above. In charities, many of whom operate lotteries as a form of fundraising, it is common practice to break down preferences into the channels that are used. The inclusion of a "catch-all" category would add additional confusion for supporters and would introduce a new category that is not required for other fundraising streams. Not only would this create confusion for charity supporters, but it would also require all marketing materials, website pages, online and offline sign-up methods to be changed so that they all reflect the same options. This is a costly and time-consuming activity with no real benefit to the charitable aims of the organisations and will do nothing to reduce the risk of harm.
The Council urges the Commission to exempt lotteries from this proposal.

15. *To what extent do you agree that the category 'any other direct communication method' future proofs the provision?*
Disagree

16. *Please give your reasons for your answer below.*
This phrase itself is too broad and does not future-proof the provision as there is no way of knowing what communication channels will be available in the future. The lack of clarification over what constitutes a "direct communication method" leaves the provision open to interpretation. For example, it is not clear whether "direct communication" covers an advert someone sees on their app or web page due to their IP address or cookies related to their browser, or a message sent as a direct message within an application or via a partner app.

17. *To what extent do you agree with the proposed change that customers should be presented with options to opt-in to gambling marketing on a product (e.g. betting, bingo, casino, lottery) basis?*
Strongly disagree

18. *Please give your reasons for your answer below. Are there any options that are missing?*

Any options related to specific opt-ins or opt-outs should be in line with GDPR and PECR guidelines. Adding a third level of regulation, covering the same form of preferences, is unnecessary and would be confusing for society lotteries and charities who need to collect, process and store the data.

19. *Do you have any comments about implementation issues, timelines and practicalities?*
Adding an additional level of regulation regarding communication opt-ins will result in confusing rules regarding legitimate interest and preferences capture across the Gambling Commission, PECR and GDPR. This will create a conflict in how data is collected and additional confusion for supporters and fundraisers, resulting in a reduction of donations to good causes.

20. *Please provide an estimate of the direct costs associated with implementing these proposals, including any updates to your marketing approach?*
Section 3 of the Council's response to Q12 addresses this point

21. *Do you have any evidence or information which might assist the Commission in considering any equalities impacts, within the meaning of section 149 of the Equality Act 2010, in the context of any proposal considered in this direct marketing section of the consultation?*
No

22. *Attaching additional information - you may attach additional information here relevant for our proposals on direct marketing if you wish.*
Please attach a copy of any documents you wish to include to this printout.

Strengthening age verification in premises
Questions 24-33: No response

Remote game design
Questions 34-59,64-66 : No response

60. *To what extent do you agree with the proposal to introduce one new section of the ISO27001 2022 standard as a requirement in RTS security audits?*
Neither agree nor disagree

61. *Please give your reasons for your answer below.*
As long as appropriate transitional provisions are contained in the implementation of this proposal, the Council has no strong opinion on the inclusion of 5.23 of ISO27001:2022, although the Commission may also wish to consider whether Including reference to ISO27001 :2022:8.12 (Data leaking prevention) and 8.28 (Secure Coding) are also appropriate.
The RTS requires that there must be an annual security audit carried out by a qualified and independent third party in respect of the parts of ISO27001 identified by the Commission. The Commission states, "Along with our response to this consultation we will publish a new version of the RTS which will contain the updated numbering of the ISO standard". Unless appropriate transitional provisions are included, this is likely to cause problems for operators who have already started the process of having their annual security audit by the independent third party.

62. *Do you think any of the other new controls from the ISO 27001 2022 update should be included in the security audit requirements?*
The Commission may wish to also consider whether including reference to ISO27001:2022:

8.12 (Data leaking prevention) and 8.28 (Secure Coding) are also appropriate.

63. *Do you have any information you wish to share regarding any direct costs associated with implementing this proposal?*
As mentioned in response to Q61, transitional provisions need to be in place to avoid additional and unnecessary cost for operators who have already started preparations for their annual audit against ISO27001:2013.

Remote gambling: financial vulnerability and financial risk
Questions 67-101: No response

Extending Personal Management Licences requirements

Proposed amendments to Licence condition 1.2.1

1.2.1 – Specified management offices – personal management licences
Applies to: All casino, bingo, general and pool betting, betting intermediary, gaming machine general, gaming machine technical, gambling software and lottery managers licences, except ancillary remote licences

1. Subject to 6 and 7 below, licensees must ensure that:
   a. each individual who occupies one of the management offices specified in 2 below in respect of the licensee or in connection with the licensed activities holds a personal licence authorising the performance of the functions of that office (hereafter 'a personal management licence'); and
   b. for each office specified at paragraph 2, at least one person occupies ~~at least one of those offices~~ that office
2. The specified management offices are those offices (whether or not held by a director in the case of a licensee which is a company, a partner in the case of a licensee which is a partnership or an officer of the association in the case of a licensee which is an unincorporated association) the occupier of which is by virtue of the terms of their appointment responsible for:
   a. the overall management and direction of the licensee's business or affairs (this is likely to be the Chief Executive Officer, Managing Director or equivalent)
   b. chairing the Board (where the licensee has such a body)
   c. the licensee's finance function as head of that function
   d. the licensee's gambling regulatory compliance function as head of that function
   e. the licensee's marketing function as head of that function
   f. the licensee's information technology function as head of that function in so far as it relates to gambling-related information technology and software
   g. oversight of the day-to-day management of the licensed activities at an identified number of premises licensed under Part 8 of the Act or across an identified geographical area
   h. in the case of casino and bingo licences only, oversight of the day-to-day management of a single set of premises licensed under Part 8 of the Act, and
   i. the licensee's anti-money laundering and counter-terrorist financing function as head of that function his is likely to include the following:
      a. for holders of casino licences, the person responsible for compliance with the relevant regulations (and appointed in accordance with those regulations); and the person responsible for submission of reports of known or suspected money laundering or terrorist financing activity under the relevant legislation (and appointed in accordance with the relevant regulations);
      b. for holders of licences other than casino licences, where an individual has been

appointed to submit reports of known or suspected money laundering or terrorist financing activity under the relevant legislation, that individual.

3. The person responsible for the licensee's gambling regulatory compliance function as head of that function shall not, except with the Commission's express approval, occupy any other specified management office.
4. Licensees must take all reasonable steps to ensure that anything done in the performance of the functions of a specified management office is done in accordance with the terms and conditions of the holder's personal management licence.
5. Where an individual is authorised by a personal licence and that licence comes under review under section 116(2) of the Act, the operating licensee must comply with any conditions subsequently imposed on that licence by the Commission about redeployment, supervision, or monitoring of the individual's work and any requirements of the Commission in respect of such matters applicable during the period of the review.
6. Paragraphs 1 to 5 above shall not apply to a licensee for so long as the licensee is a 'small-scale operator' as defined in the Gambling Act 2005 (Definition of Small- scale Operator) Regulations 2006 ('the Regulations').
7. During the period of 3 years commencing with the date on which a licensee ceases to be a small-scale operator paragraphs 1 to 6 above shall apply subject to the proviso that the phrase 'each individual' in paragraph 1a shall not include any individual who was a 'qualified person' (as defined in the Regulations) in relation to the licensee 28 days immediately prior to the licensee ceasing to be a small-scale operator.

In this licence condition:
'the relevant regulations' refers to The Money Laundering, Terrorist Financing and Transfer of Funds (Information on Payer) Regulations 2017 or any UK Statutory Instrument by which those regulations are amended or superseded
'the relevant legislation' refers to the Proceeds of Crime Act 2002 and Terrorism Act 2000.

102. *To what extent do you agree with the proposed clarification to the requirement for a CEO, Managing Director or equivalent to hold a PML?*
Neither agree not disagree

103. *To what extent do you agree with the proposal that for organisations with a Board, the person responsible for chairing the Board should hold a PML?*
Neither agree not disagree

104. *To what extent do you agree with the proposal that the person responsible for the licensee's anti-money laundering and counter- terrorist financing function as head of that function should hold a PML?*
Neither agree not disagree

105. *Do you have any comments relating to which employees within a gambling business should be required to hold a PML?*
Where a charity holds a licence to operate a lottery and has appointed an external lottery manager to help manage the lottery, it seems disproportionate and burdensome for that charity to have to adapt from the present requirement that at least one person has to occupy at least one of the specified management offices, to the new proposed requirement that at least one person has to occupy each of the specified management offices.

106. *Do you have any comments about implementation issues, timelines and practicalities?*
The Council has a number of comments to make:

The proposed amendments to 1.2.1.1(b) require licensees to ensure that, for each office specified in 1.2.1.2, at least one person occupies that office. This does not seem to sit well with 1.2.1.2(g) and 1.2.1.2(i)(b), as operators don't seem to actually need to have people in those offices. 1.2.1.2(g) relates to premises licences, so the words "in the case of premises licences only" should be added to the start of 1.2.1.2(g). In a similar manner, as there is no obligation to appoint someone to report suspected money laundering or terrorist financing activity for non-casino licensees, it may be clearer if 1.2.1.1(b) were amended to say something like "for each office specified at paragraph 2 (other than subparagraph (i)(b) ..."
The proposed new 1.2.1.2(i), as currently written, makes no sense due to a typo.
Provision 1.2.1.3 is unchanged and provides that the head of regulatory compliance cannot, except with the Commission's express approval, occupy any other specified management office. However, the proposed addition of 1.2.1.2(i) requires those appointed to submit money laundering reports to hold a PML. It seems likely that in some operators, the head of regulatory compliance would also be the person appointed as MLRO. The need to give express approval to the head of regulatory compliance also being the MLRO seems excessive given that there is no conflict of interest which could arise between the roles. The Council therefore suggests that the Commission consider adding "…other than that specified in paragraph 2(i)" to end of 1.2.1.3.

107. *Please provide an estimate of the direct costs associated with implementing these proposals.*
No response

108. *Do you have any evidence or information which might assist the Commission in considering any equalities impacts, within the meaning of section 149 of the Equality Act 2010, in the context of any proposal considered in this consultation?*
None

109. *If you have any further documents in support of your response to this section of the consultation on personal management licences, please use the 'choose file' button below*

Changes to Regulatory Panels
Questions 111-116, 121-124: No response

117. *To what extent do you agree with the proposal that Regulatory Panels will take decisions on the papers unless the Panel considers that a hearing is required?*
Strongly disagree

118. *Please give your reasons for your answer below.*
One of the two main reasons put forward for the proposal is "to reduce the burden on applicants/licensees … who can find hearings difficult and stressful to manage". The Council suggests giving the applicant/licensee a right to have an oral hearing, but if they don't request this, then the default should be a paper-based hearing.
It is common throughout the judicial process in the UK for those involved in litigation to have the right to present their arguments at a hearing, rather than just on paper. This should also be a feature of the Commission's decision-making process, given the significant impact such decisions can have on applicants/licensees. The applicant/licensee should always have the right to a hearing, rather than the Commission themselves determining whether they feel "fairness required a hearing".
The other main reason for the Commission's proposal, "to increase the promptness of

decision-making, since it is easier to convene a Panel/Adjudicator for a paper-based decision process than to get all of the parties to a hearing together at the same time" is not a compelling argument for overriding the right of an applicant/licensee to have a hearing if they want one. Given that developments in technology could facilitate such hearings being remote, it should not be problematic to organise a hearing should be applicant/licensee require one.

119. *To what extent do you agree with the proposal that personal licence matters will be decided on the papers unless the Adjudicator considers that a hearing is required?*
Strongly disagree

120. *Please give your reasons for your answer below.*
The applicant/licensee should always have the right to a hearing but, if they choose not to exercise this right, the hearing can be decided on paper.