

Guiding Principles for the Application of Enforcement Measures

1 Background

1.1 Scope and Purpose

This Explanatory Note is intended to substitute the Explanatory Note issued in May 2016, Guiding Principles for the Quantification of Administrative Fines, in order to reflect the regulatory developments that have taken place following the issuance of the latter.

This Explanatory Note is intended to delineate the guiding principles which the Authority embraces and considers when deciding on which enforcement measure is most appropriate and proportionate in the context of the breach committed, and where the enforcement measure is an administrative penalty or a regulatory settlement in lieu of criminal proceedings, the quantum of such penalty. The Authority has wide discretionary powers in deciding the magnitude of an administrative penalty and therefore, this Explanatory Note serves as guidance to shed light on the manner in which such discretion is exercised and the reasoning underpinning such decisions.

1.2 Legal Framework

The Malta Gaming Authority [hereinafter 'the Authority'], as established by means of article 5(1) of the Gaming Act (Chapter 583 of the Laws of Malta) [hereinafter 'the Act'], is empowered to impose different types of enforcement measures for non-compliance with the provisions of the Act or any other regulatory instrument by persons or entities holding an authorisation issued by the Authority [hereinafter 'the Authorised Persons'].

By virtue of regulation 8 of the Gaming Compliance and Enforcement Regulations (S.L. 583.06) (hereinafter the 'Regulations'), the enforcement measures which the Authority may take consist of the following:

- (a) Issue an order, howsoever named, directing the Authorised Person to do, or to refrain from doing, something or to otherwise correct its conduct and, or operations;
- (b) Issue a warning, howsoever named, directing the authorised person to do, or refrain from doing, something in the future;
- (c) Add, remove, or amend conditions attached to the authorisation held by the relevant Authorised Person;
- (d) In the case of a breach which is not an offence against the Act, impose an administrative penalty in terms of article 25(3) of the Act;

- (e) In the case of a breach which is an offence against the Act, and without prejudice to the possibility of offering a regulatory settlement in lieu of criminal proceedings in line with article 25(1) of the Act, file a report to the Executive Police for the commencement of criminal proceedings; and
- (f) Suspend or cancel a licence, as the case may be.

The regulatory instruments distinguish between breaches of the regulatory instruments which amount to offences against the Act, and therefore are criminal in nature, and breaches which are administrative in nature. In the case of the former, criminal proceedings are envisaged, with the offender being liable to a fine (*multa*) or a term of imprisonment, or both. However, the Authority is also empowered, in terms of article 25 of the Act, to offer the offender the possibility of entering into a regulatory settlement in lieu of criminal proceedings.

Upon the conclusion of such agreement, the offender's criminal liability under the Act with regard to the offence or offences in relation to which the agreement has been entered, is extinguished.

2 Selection of the appropriate Enforcement Measure

2.1 Purpose of Enforcement Measures

As outlined in section 1.1 of this Explanatory Note, the Authority is authorised to take different forms of enforcement measures against Authorised Persons in situations of non-compliance, in accordance with article 8 of the Regulations. In order to decide on the most appropriate approach, the Authority considers the measures not conducive to the achievement of *inter alia* the following aims [the list is not exhaustive]:

- (a) Ensuring that the licensee rectifies any default;
- (b) Ensuring that the interests of the players and those of the general public are adequately safeguarded;
- (c) Ensuring that any financial gain which the Authorised Person may have made through non-compliance is neutralised; and
- (d) Ensuring that the licensed operation can be carried out in adherence to regulatory requirements.

As a general rule, the enforcement measures are therefore resorted to as follows:

- (a) A warning is issued when the breach in question does not directly undermine the achievement of one of the regulatory objectives set out at law, and the licensee's behaviour includes one or more mitigating circumstances;
- (b) An administrative penalty is imposed when:
 - i. The breach committed undermines one or more regulatory objectives; and, or
 - ii. The breach committed does not undermine one or more regulatory objectives, but the licensee's behaviour includes one or more aggravating circumstances; and, or
 - iii. The recent compliance track record of the licensee, in general, is not sufficiently good.
- (c) The licence is suspended where there are issues which undermine the Authorised Person's ability to conduct its operations in a manner compliant with applicable legislation, but such issues may be remedied with appropriate action which the licensee commits to undertake;
- (d) The licence is cancelled when the licensee's operation is affected by systemic issues which, in the Authority's determination, cannot be remedied in a manner which would be satisfactory for the Authority to permit the licensee to recommence operations; and
- (e) In relation to breaches of a criminal nature, the considerations envisaged above, as well as aggravating and mitigating circumstances, guide the decision of the Authority as to whether to offer a regulatory settlement to the offender, or to opt for the commencement of criminal proceedings.

Pertinently, the Authority is also empowered to publish any sanction it imposes. Suspensions and cancellations of licences, as well as the institution of criminal proceedings, are in and of themselves public in nature and are therefore notified by the Authority to the general public.

Other sanctions are not normally published in a manner which identifies the person in breach, in light of the fact that the publication itself is deemed by the Authority to be equivalent to a sanction in and of itself, owing to the reputational damage it may cause, and is therefore not necessarily conducive to the objective which the enforcement measure seeks to achieve. However, when the Authority determines that the nature of the breach is such that the sanction warrants publication, generally due to the fact that it is deemed beneficial for the general public to be aware of the breach committed and the sanction stemming therefrom, it may elect to publish the sanction.

2.2 Detailed Decision-making Criteria

In deciding which enforcement measure should be imposed, the Authority takes into account the considerations listed hereunder [the list is not exhaustive]:

The nature of the breach

The criteria educating the selection of the appropriate enforcement measure are, at a high level:

- (a) The impact or the potential impact of the breach on the financial stability of the Authorised Person;
- (b) The impact of the breach on the regulatory objectives pursued by the Authority;
- (c) The seriousness of the breach, including but not limited to:
 - i. The duration and/or frequency of the breach;
 - ii. The scale of the breach;
 - iii. Whether the Authorised Person or any involved party derived any financial and/or any other benefit; and
 - iv. Whether it reveals serious or systemic weaknesses or potential weaknesses in the Authorised Person's business model, financial strength, governance, risk or other management systems and/or internal controls relating to all or part of the Authorised Person's business;
- (d) The impact of the breach on the Authorised Person's players;
- (e) Mitigating and aggravating circumstances;
- (f) The likelihood that the same or a similar type of breach will recur;
- (g) The action that the Authority has taken in comparable circumstances.

Mitigating and aggravating Circumstances

Ex ante:

- (a) Whether the breach appears to have been deliberate or due to negligence;
- (b) Whether, if the breach took place due to negligence, it continued after the Authorised Person became aware of it; and
- (c) The involvement or lack thereof of senior management and/or of the persons entrusted with the key functions. In case of lack of involvement, whether adequate

internal controls exist that are aimed at ensuring that senior management and/or the persons entrusted with the key functions have the necessary level of visibility and control.

Ex post:

- (d) Whether any attempt was made to conceal the failure or breach;
- (e) How promptly, comprehensively and effectively the Authorised Person brought the breach to the attention of the Authority and/or other regulatory and/or law enforcement agencies after it was committed, and the Authorised Person became aware thereof;
- (f) The nature, extent, promptness, proactiveness, and effectiveness of any remedial action taken by the Authorised Person to remedy the breach and/or the effects thereof;
- (g) The degree of cooperation shown by the Authorised Person during the investigation of the breach carried out by the Authority and/or other regulatory and/or law enforcement agencies;
- (h) The degree of cooperation shown by the Authorised Person in complying with requests by the Authority and/or other regulatory and/or law enforcement agencies for the implementation of remedial action by the Authorised Person.

The previous disciplinary and/or supervisory record of the Authorised Person, including:

- (i) Any previous enforcement or other regulatory action by the Authority and/or other regulators and/or law enforcement agencies that resulted in an adverse finding against the Authorised Person;
- (j) Any warnings given to the Authorised Person by the Authority on the same or related issues;
- (k) Any previous agreement or undertaking by the Authorised Person to the Authority and/or other regulators to act or refrain from acting or behaving in a particular manner and the Authorised Person's compliance, or lack thereof, with said agreement or undertaking;

The general supervisory record of the Authorised Person, in particular with respect to matters relevant to the breach in question.

2.3 Quantification in the case of Penalties

When the Authority decides that the appropriate enforcement measure is the imposition of an administrative penalty – in the case of an administrative breach – or the offering of a regulatory settlement – in case of a criminal offence - the quantification takes place in the steps outlined hereunder:

- i. **Step 1** – where relevant, the disgorgement of any economic benefit obtained by the Authorised Person through the breach;
- ii. **Step 2** – the determination of a figure which is appropriate in view of the nature and scale of the breach, and the extent to which it affects the regulatory objectives;
- iii. **Step 3** –an adjustment to the figure taking into account any relevant aggravating or mitigating factors;
- iv. **Step 4** –where appropriate, an adjustment taking into account the financial hardship which the administrative fine will cause to the Authorised Person where this may be deemed disproportionate to the breach committed (the burden of proving financial hardship lies in all cases with the Authorised Person).

3 Procedural Matters

The Authority monitors the compliance performance of its licensees on an ongoing basis, underpinned by a risk-based approach. Upon the discovery of a possible breach, as the case may be, the Authority conducts a compliance review in terms of regulation 6 of the Regulations. Upon the conclusion of such review, depending on the information available to it, the Authority may either proceed directly to enforcement measures, or it may initiate a formal investigation in terms of regulation 7 of the Regulations.

When the decision is taken that an enforcement measure is required, whether following a compliance review or following a formal investigation, the Authority issues a notice in writing, giving the Authorised Person an amount of time to submit a defence and make any other pertinent submissions. However, the Authority may, in circumstances of an exceptional nature and, or in the interest of players or on grounds of public policy, public security or the safeguarding of the reputation of Malta, exercise any of the enforcement measures mentioned in section 1.1 prior to the performance of the review and, or investigation, or following the conclusion thereof but prior to the lapse of the time within which the Authorised Person may contest the findings.

Once the Authority receives a reply from the Authorised Person, the contents thereof are analysed and the Authority re-assesses the existence of the breach, and the nature and severity of the enforcement measure to be applied, depending on the feedback provided.

In the instance that a regulatory settlement is offered in lieu of criminal proceedings where the breach amounts to a criminal offence, the Authorised Person is given a reasonable period of time to consider whether to accept the settlement or otherwise. Where the Authorised Person is not forthcoming, the Authority proceeds to refer the matter to the law enforcement for proceedings to be initiated.