

**Report of the Independent Review
of the Regulation of BetIndex Limited**

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BetIndex Report Chapter 1 - Introduction

1. On 7 June 2021 The Department for Digital, Culture Media & Sport (“**DCMS**”) announced that Ministers had commissioned an independent review into the regulation of BetIndex Limited (“**the Review**”). BetIndex Limited, which operated the Football Index platform, is currently in administration and the Football index platform is suspended. This chapter serves as an introduction to the Report in which the Review states its conclusions and recommendations (“**the Report**”).
2. This chapter sets out:
 - a. The background to the commissioning of the Review;
 - b. The terms of reference of the Review;
 - c. The legal status of the Review and Report.

The Review’s conclusions and recommendations are summarised in chapter 2 of the Report. The Review’s account of relevant events and the basis for its conclusions and recommendations are set out in chapters 3-8 of the Report.

A. Background

3. On 11 March 2021 the Gambling Commission (“**the Commission**”) suspended the gambling licence of BetIndex Limited (“**BetIndex**”), the company incorporated in Jersey which operated the Football Index online platform (“**Football Index**”). At that time BetIndex had 278,585 customer accounts. On 26 March 2021 the English High Court made an order placing BetIndex into administration, pursuant to a letter of request dated 18 March 2021 from the Royal Court of Jersey.
4. BetIndex had been incorporated in July 2015. It was granted a gambling licence by the Commission in September 2015 under which it operated the Football Index online platform. The Football Index product was developed over time and was presented with features that resembled investing on a stock market. Much of the terminology used on the website mirrored terminology used in financial markets.¹ For marketing purposes Football Index was sometimes

¹ See Affidavit of Neil Kelly in the Jersey insolvency proceedings.

referred to as a ‘football stockmarket’.²

5. Customers, who were referred to as “Traders” would buy “Shares” in a specific football player (“**Shares**”), thereby placing a bet on the football player’s future performance. Customers received a right to receive winnings known as “Dividends” paid out by BetIndex on the occurrence of certain events (“**Dividend Events**”). The Dividend Events changed over time, but by March 2021 were based on a football player’s performance in an eligible match, top three performances in a given month and media ‘mentions’. Many Shares could be issued in respect of any given player. Each Share had a time-limit of three years, and after that time (unless the Share was sold to another Trader) it would expire.
6. As well as potentially being paid Dividends during the life of the Share, a key feature of Football Index as it developed was the ability of customers to sell their Shares before their expiration either to BetIndex directly or, via BetIndex, to other customers. BetIndex derived its revenue from selling newly-created Shares and from commission earned on sales of Shares between Traders.
7. The Football Index platform grew significantly after BetIndex was first granted a licence by the Commission. The Commission carried out compliance assessments of BetIndex and as a result of these in May 2020 the Commission escalated matters by commencing a formal statutory review of BetIndex’s licence. This licence review was commenced because the Commission had concerns regarding BetIndex’s business model, integrity and or competence. That review had not been completed by March 2021, and because BetIndex’s licence remains suspended rather than revoked, the review is still ongoing as is a review into the relevant personal management licence holders. In addition, there have been administration proceedings in relation to BetIndex.
8. Commencing in May 2019 there had been interaction between the Commission and the Financial Conduct Authority (“**FCA**”), which regulates the UK’s financial services and markets, as to whether all or part of the Football Index product should be regulated by the FCA rather than by the Commission. In March 2021 those discussions remained unresolved.

² BetIndex claim that this word was deliberately mis-spelt.

9. BetIndex's decision to suspend access to the Football Index website and the suspension of BetIndex's licence attracted significant adverse publicity. The suspension of the Football Index platform meant that customers lost the ability to sell their Shares, whether to or via BetIndex. As of 17 March 2021 the total Share valuation sell price displayed on the Football Index website was £18,551,397.75 (based on the amount that customers were willing to pay for a Share at that time). The value of open bets (based on the price paid by the customer) was £124,264,610.27. The Review notes that the value of the Football Index Shares is subject to a range of possible methodologies, and will ultimately be a matter for the company's administrators and the courts.
10. Although unstaked customer funds were held in a trust account, customers were unable to access such funds or receive accrued Dividends (as defined in Chapter 4 at paragraph 5.g) until the High Court provided clarification on 8 June 2021 as to how each customer's entitlement should be calculated. The Review understands that withdrawals of customer funds have since begun.³ This arrangement is limited to the payment of unstaked funds and accrued Dividends and does not provide any means for customers to trade the Shares that they purchased on the Football Index platform.
11. These events prompted calls for a public inquiry. In addition, a number of Football Index customers are investigating possible legal action.

B. The Review's Terms of Reference

12. Malcolm Sheehan QC was appointed to undertake an independent review of the regulation of BetIndex on 2 June 2021 and to provide the Report to the Secretary of State for Digital, Culture Media and Sport and the Economic Secretary to the Treasury. The purpose of the Review, as stated in its Terms of Reference, is to examine the regulatory circumstances around the granting of a licence to BetIndex, its subsequent suspension and the company's ultimate financial failure. It considers the actions taken by the Commission and other regulatory bodies regarding this complex betting product.
13. The Review is intended to provide an objective account of what the Commission and other relevant regulatory bodies did, identify any lessons for them, and inform the Government's

³ <https://www.gamblingnews.com/news/football-index-administrators-start-customer-funds-repayments/>

Review of the Gambling Act 2005,⁴ which is considering whether changes are needed to the regulatory framework around gambling, including the Commission’s powers and how it uses them. The Commission continues to carry out its own regulatory investigation into BetIndex. This Review is separate to the Commission’s investigation, and has been carried out and this Report written in a manner which will not compromise it. The Review covers the period from September 2015 to 11 March 2021, when the Commission suspended BetIndex’s licence.

14. The Review has specifically been tasked in its Terms of Reference with reporting on:

(1) The actions taken by the Commission in:

- a) Licensing BetIndex, including its assessment of the company’s financial circumstances as part of their suitability to hold a licence.
- b) Monitoring changes to the product offer and ensuring the operator’s compliance with the gambling licence conditions.
- c) Responding to concerns raised about the product and operator in the course of internal compliance activity and/or following interventions from third parties including customers and the Advertising Standards Authority (“**ASA**”).
- d) Reviewing BetIndex’s gambling licence from May 2020, including how it cooperated with other regulatory bodies.
- e) Deciding to suspend BetIndex’s licence in March 2021.

(2) The actions taken by the FCA in:

- a) Responding to the Commission following their initial approach.
- b) Considering whether the product amounted to a regulated activity under the Financial Services and Markets Act 2000 (“**FSMA**”).

⁴ Launched on 8 December 2020.

- (3) The degree to which the Commission and other regulatory bodies work together in relation to licensed gambling operators offering novel products, and if better working between regulatory bodies can be facilitated in future.
- (4) What, if anything, the Commission and other relevant regulatory bodies could have done differently to better deliver their statutory responsibilities and the three licensing objectives set out in the Gambling Act 2005, and whether this could have:
 - a) Prevented the product from being offered in the form that it was; and
 - b) Avoided the collapse of the product and related losses to customers.

15. A full copy of the Terms of Reference appears at Annex 1 to this Report. It should be noted that this Review relates to the regulation of BetIndex, and does not extend to assessing the actions undertaken by BetIndex, its directors or personnel. The Review's Terms of Reference do not include expressing a view on any legal questions such as which regulator should have been responsible for regulating BetIndex. Nor is it the purpose of the Review to seek to apportion blame or give views as to any legal liability arising as a result of the events set out in this Report.

16. The Report has been provided to the Secretary of State for Digital, Culture Media and Sport and the Economic Secretary to the Treasury for the purpose of facilitating, enabling or assisting them in the discharge of their public functions in relation to the Commission and the FCA.

C. Legal disclaimer

17. This Report has been prepared by Malcolm Sheehan QC in his capacity as the independent reviewer appointed by Ministers on 2 June 2021. Mr Sheehan QC has been assisted by Christopher Adams in the conduct of this Review, including the preparation of this Report.

18. The views, conclusions and recommendations attributed to the Review in this Report are those of Mr Sheehan QC, based on the documents, information and materials provided to the

Review by the Commission, the FCA and others. These are summarised in Annex 2 to this Report. The Review has no statutory powers, has depended on voluntary co-operation provided by those it has been in contact with and has only been able to consider and reach views based on the documents that have been provided to it.

19. The Review is addressed to Ministers and is intended to inform their understanding of the events that took place and the formation of future policy. The Review is not intended to and does not determine any issues of legal liability and it should not be relied on by any party for these purposes or by any party other than DCMS for any purpose.
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BetIndex Report Chapter 2 - Executive Summary

1. This chapter summarises the conclusions and recommendations of the Review in respect of the issues raised in the Terms of Reference described in chapter 1. The abbreviations used in this executive summary are introduced throughout the Report and there is also a glossary of terms used in Annex 3. A time line of relevant events is set out in Annex 4 to this Report.

A. The actions taken by the Commission

2. The Review's key findings in relation to the actions of the Commission are:
 - a. A major aspect of the Football Index model as originally marketed, the 'go-to-market' function which allowed players to sell their Shares to other players by placing them in a 'sell queue' (also referred to as the 'cash-out' function) was not notified to the Commission as part of BetIndex's application. The Commission expects applicants to be open and transparent in their applications and to provide information in respect of all relevant aspects of the product within their application form.
 - b. Although not described in BetIndex's application, the 'go-to-market' feature appears to have been part of the Football Index website which was reviewed twice by the Commission during the licensing process. The go-to-market' feature was not noted during these reviews and the Football Index website was therefore launched in October 2015 without any significant consideration of one of its two main features.
 - c. The aspects of the Football Index product that resemble a stock market, together with the use of the language of investment and financial services in the description of those features, and any resulting potential for consumers to be confused as to whether the product was a bet or an investment, were not considered by the Commission at the licensing stage.
 - d. Although it seems likely that the Commission considered whether Football Index's terms and conditions were consistent with the licensing objective of fair and open

gambling, the assessment at licensing took place in September 2015 before the Consumer Rights Act 2015 and licence condition 7.1.1 had come into effect.⁵

- e. It does not appear to the Review that the Football Index terms and conditions were subjected by the Commission to detailed legal scrutiny as to their fairness prior to 2019. The website had been operating for more than 3 years and its customer base had grown substantially before this occurred.
- f. Since 2017 the Commission has operated a risk-based assessment which determines the degree and type of regulatory scrutiny an operator is placed under. Likely impact is the key component of this risk assessment, and the size and scale of the operator are the major determinants of likely impact. The novelty of a product or any particular problems it may present are not currently significant factors in the Commission's risk-based assessment.
- g. BetIndex was initially assessed as a small operator and, in line with the Commission's budget, resources and regulatory model, was not proactively monitored by the Commission other than by the review of submitted Key Events, regulatory returns and Information Security Audit reports.
- h. During the period between 2015 and early 2019 the Commission was not notified by BetIndex of the addition of an 'instant sell' function in 2016 and did not itself pick up on references to the Football Index product having changed in a March 2018 Information Security Audit report or in a letter from BetIndex dated 4 March 2018.⁶
- i. BetIndex increasingly came to the Commission's attention as its gross gambling yield increased, but the change in business model from the one which the Commission understood that it had licensed was not noticed until BetIndex's application for a further licence in January 2019.

⁵ The Unfair Terms in Consumer Contracts Regulations 1999, which were in effect at that time, provided for an assessment of the fairness of contractual terms in consumer contracts which were not individually negotiated. Further, the Review assumes that the Commission was aware in September 2015 that the Consumer Rights Act 2015 would be coming into force on 1 October 2015.

⁶ Paragraph 49 of chapter 5.

- j. Therefore, for the first three years of its operation the Football Index product offered a key functionality, the ability for customers to buy and sell Shares, that had not been regulated or properly appreciated by the Commission as part of the licence issued. It is this functionality, and consumers' current inability to use it to sell their Shares, that has generated much of the concern arising from the suspension of BetIndex's operating licence.
- k. From the time when the Commission first became aware of the full nature of the Football Index product in early 2019, a significant amount of time was taken whilst the Commission sought a greater understanding of what was undoubtedly a novel and (at least from the legal perspective) complex product. While detailed investigation and a cautious approach was merited, the Review considers that the nearly two years that passed between 2019 and the suspension of BetIndex's licence in March 2021 was too long.
- l. This delay was at least partly because of the Commission's ongoing discussions with the FCA concerning whether part or all of the Football Index product fell within the FCA's regulatory remit, and partly due to the Commission working within the resource constraints of the lockdown imposed in response to the Covid-19 pandemic.
- m. None the less, the Commission continued to regulate the Football Index product for an extended period despite having formed the view that parts of the product did not fall within its remit. The Commission has told the Review that it considered it better to seek to obtain some protection for consumers via FCA regulation if this were possible.
- n. From May 2019 onwards the Commission's regulation of BetIndex's operations became more proactive and there were compliance assessments in May 2019 and February 2020 which identified many of the concerns which are examined in this Review, including those relating to AML and SR. The Commission's letter dated 1 April 2020 required BetIndex to take steps to ensure that its product, its presentation to consumers, and the terms and conditions associated with the product, did not contravene licence condition 7.1.1, which resulted in BetIndex revising the Football Index website to make it clear that the product was a betting product.

- o. The compliance assessments were escalated to a full licence review in May 2020. This included issues such as whether BetIndex's terms and conditions were fair within the meaning of the Consumer Rights Act 2015, and compliance with AML and SR obligations. While important issues were identified and considered by the Commission, this did not result in any decisive action until March 2021.
- p. Having only become fully aware of the issues raised by the Football Index product from 2019 onwards, the Commission was then faced with the dilemma that any drastic regulatory action it might take, such as a suspension of BetIndex's gambling licence, risked creating panic amongst consumers and a possible collapse of the Football Index platform.
- q. When it did occur, the Commission's decision to suspend BetIndex's licence was reactive rather than proactive, a result of the financial situation of which BetIndex made the Commission aware in March 2021.
- r. While the operational model of the proposed licensee is considered during the licensing process, the Commission's focus is on ensuring that the operator is clear concerning the degree of protection (high, medium or no protection) that will be put in place in respect of customer's unstaked funds. The Commission viewed funds used to purchase Shares in Football Index as staked funds that were entirely at risk.
- s. The Commission's consideration of the operational model of an operator does not extend to the regulation of the business overall. As stated in the Commission's policy statement, the Commission is not concerned with assessing the overall viability of any gambling business. The Commission does not therefore ask itself, when assessing an application for a licence, whether a business such as BetIndex was bound to fail.
- t. While the extent to which the Commission investigated and acted on information which it received about BetIndex from third parties is sometimes unclear on the materials provided to the Review, BetIndex was already under scrutiny by the Commission at the time the complaints were received in relation to the issues raised by those complaints.

B. The actions taken by the FCA

3. The Review's key findings in relation to the actions of the FCA are:
 - a. The FCA's consideration of BetIndex's regulatory position continued, with some intervals, for two years. During this period there were a number of delays in the FCA providing responses to the Commission. The FCA's suggestion that, had it been provided with more information by the Commission, it would have acted quicker and reached an earlier final determination of its position, is necessarily speculative.
 - b. During the period between May 2019 and mid 2021 the FCA has held and/or expressed to the Commission and BetIndex different and inconsistent positions about whether any or all elements of the BetIndex product fell or were likely to fall within its regulatory remit.
 - c. After the Commission made an initial request for the FCA's view with regard to regulation of the Football Index product on 29 May 2019, the FCA did not provide a substantive response until 24 September 2019, at which point it stated to the Commission that the FCA's view was that the product should be dual-regulated.
 - d. The FCA's UBD then reached the view more than four months later that BetIndex "*may not be a case we take forward*" despite advice that it might fall within the FCA's regulatory perimeter. That conclusion appears to have been determined, at least in part, by policy considerations as to the extent to which the FCA considers that betting products should come within its regulatory perimeter. The UBD did not initially communicate that decision either to the Commission or to the FCA's Intelligence Department.
 - e. According to the FCA, its view that the FCA would not take action in relation to the regulation of BetIndex was communicated to the Commission in a telephone call on 10 February 2020. The Commission, however, does not appear to have understood the FCA to be stating definitively that it would not regulate part of the product, as the Commission continued to seek meetings to discuss dual regulation of BetIndex over the following year until the company's licence was suspended.

- f. On 16 September 2020 the FCA issued BetIndex with Individual Guidance which stated that the FCA's view was that the whole BetIndex product was likely to fall within the FCA's remit, albeit that perimeter questions may ultimately be determined by the courts. That Individual Guidance prompted BetIndex's request for a review because it did not accord with the conclusions reached by either the Commission (that the product should probably be dual-regulated) BetIndex's own legal advisors (that the product should be regulated solely by the Commission) or, apparently, the FCA's previous position (that the product should be dual-regulated).

- g. In the face of the need to consider the regulatory position of an undoubtedly novel product, the legal interpretation of which was nuanced and open to different conclusions, the FCA did not obtain external legal advice from leading counsel until after BetIndex's gambling licence had been suspended.

- h. The FCA's decision making around the question of where regulatory responsibility for BetIndex fell was influenced by its view that the Football Index product was understood by consumers to be a gambling product rather than an investment. Responses following the suspension of BetIndex's licence suggest that this was not the case for at least some of BetIndex's customers and it is not clear to the Review how far the FCA gave detailed consideration to the effect on consumer understanding of the extensive use of the language of finance and investments in connection with the Football Index product.

- i. The FCA's approach to deciding whether to take further action in relation to the regulation of BetIndex appears, at times at least, to have been led by its assessment of relative priorities in light of the resources available rather than by a legal analysis of whether the BetIndex product fell within the legal ambit of FCA's regulatory responsibility: *"Ultimately, this is not really about the extent to which these activities fall within scope but rather whether this is conduct we are likely to prioritise"*.

- j. The FCA's approach in relation to taking further actions was also influenced by its awareness that BetIndex was being regulated by the Commission. However, the fact that the Commission was acting as regulator did not provide an answer to the question of whether any or all of BetIndex's activities fell within the regulatory responsibility of the FCA.

C. Extent of Regulatory Co-operation and proposals for improvement

4. As far as the Commission's co-operation with other regulatory bodies in respect of the licensing novel gambling products is concerned:
 - a. While the Review considers that there are examples of the Commission and the FCA working well together in relation to the regulation of some products, the level of effective co-operation between the FCA and the Commission in relation to BetIndex over an almost 2 year period was clearly insufficient.
 - b. There were a number of delays in the FCA providing responses to the Commission and the need to resolve the question of regulatory responsibility in relation to BetIndex was not given sufficient priority. Instead a regulatory impasse was allowed to develop and continue over far too long a period.
 - c. Addressing the regulatory stalemate with the FCA appears to have been the Commission's main focus in dealing with the regulatory challenges presented by BetIndex and may have diverted it from taking other actions to improve the position of BetIndex customers before the suspension of BetIndex's licence.

5. The Review considers that the Memorandum of Understanding agreed between the Commission and the FCA is an appropriate and proactive step to address the issues that arose in relation to BetIndex. However, as currently drafted, it does not adequately address all of the Review's areas of concern:
 - a. It is important that an appropriate mechanism for resolving regulatory responsibility disputes is promptly agreed upon and then implemented. Internal escalation within the Commission and the FCA alone does not ensure that a repetition of the stalemate that occurred in respect of BetIndex would not be repeated.
 - b. The Memorandum of Understanding should include effective mechanisms, including agreed timetables, for ensuring that regulatory responsibility disputes are identified, discussed and, if necessary, escalated then referred for dispute resolution promptly so that matters are not allowed to drag in the way that occurred in respect of BetIndex.

- c. The Memorandum of Understanding should also include clear provisions for the written recording of the outcome of discussions dealing with matters of regulatory responsibility, so that there is no repeat of the situation in which two regulatory bodies give differing accounts and have different understandings of the same events.

D. Areas for improvement, recommendations and possible effect of different regulatory actions

6. Chapter 8 of the Report sets out areas where the Review considers that better or different regulatory actions could have been taken by the Commission and the FCA. These are reflected in the recommendations made by the Review to improve regulatory practice, which are each aimed at addressing the issues that the Review has identified as contributing to the problems that arose in respect of the regulation of BetIndex.
7. In the case of the Commission these recommendations relate to:
 - a. Prioritisation of novel products for enhanced regulatory scrutiny
 - b. Greater focus on fairness of terms at the licensing application stage
 - c. Consideration of the effect of the language of investment and the financial markets on consumer understanding of gambling products
 - d. Greater licensing and continuing scrutiny of divergences between described and actual features of a product
 - e. Prompter decision making and action
 - f. Recognition for the need for internal escalation
 - g. Consideration of a different approach to customer funds in relation to long-term, tradeable products

8. In the case of the FCA the Review's recommendations relate to the need for:
 - a. Prompter decision making
 - b. Consistent decision making across different departments within the FCA
 - c. Better co-operation with the Commission

9. The Review considers that had the Commission carried out a detailed consideration of the fairness of BetIndex's terms and conditions (including BetIndex's use of the language of financial markets and investments in the description of the Football Index product) at the licensing application stage, it would have been entitled within its regulatory powers to require BetIndex to emphasise from the outset that its Shares were a leisure bet rather than a financial investment. The Review considers that this would have been likely to have reduced the number of BetIndex's customers and the amount that they staked. Beyond this the Review is not in a position to conclude on the materials available to it whether different regulatory action would have produced a different outcome for BetIndex's customers.

BetIndex Report Chapter 3 - The Regulatory Framework

1. This Chapter sets out the relevant regulatory framework for the Commission and the FCA. Both gambling and financial services are regulated activities. The Commission and the FCA operate under different statutory regimes and have different regulatory powers and approaches reflecting the nature of the activities that they regulate.
2. The extent to which the Commission and the FCA relied on their statutory powers or considered that BetIndex's activities fell within them is considered in chapters 5, 6 and 8 of the Review.

A. Regulatory Framework for the Gambling Commission

(1) Principles of gambling regulation

(a) The Gambling Act 2005

3. All commercial gambling in Great Britain including the National Lottery, with the exception of spread betting, is regulated under the Gambling Act 2005, which makes it an offence to provide facilities for gambling (as defined in the Gambling Act 2005) without an operating licence unless the activity is exempt.⁷ The Commission, established under section 20 of the Gambling Act 2005 as the national regulator of gambling in partnership with local licensing authorities, is an executive non-departmental public body sponsored by the Department for Digital, Culture, Media and Sport.⁸
4. Section 1 of the Gambling Act 2005 set outs three licensing objectives:
 - (1) preventing gambling from being a source of crime or disorder, being associated with crime or disorder or being used to support crime;

⁷ The jurisdiction under the Gambling Act 2005 includes holders of remote gambling licences situated outside Great Britain but whose facilities are used in Great Britain (section 36 of the Gambling Act 2005).

⁸ <https://www.gamblingcommission.gov.uk/about-us/guide/what-we-regulate>. Membership of or employment by the Commission is not employment in the civil service of the State (paragraph 17(3) of Schedule 4 to the Gambling Act 2005).

- (2) ensuring that gambling is conducted in a fair and open way, and
 - (3) protecting children and other vulnerable persons from being harmed or exploited by gambling.
5. In exercising its functions under the Gambling Act 2005 the Commission must aim to pursue, and wherever appropriate have regard to, the three licensing objectives. The Commission is required to permit gambling in so far as the Commission thinks doing so will be reasonably consistent with pursuit of the licensing objectives.⁹
6. The Commission's principal functions under the Gambling Act 2005, as amended by the Gambling (Licensing and Advertising) Act 2014, are:
- (1) Licensing gambling operators by way of issuing operating licences authorising the licensee to conduct one or more of 10 specified gambling activities, either by way of a licence which authorises facilities to be provided from premises or a remote operating licence;¹⁰
 - (2) Issuing personal licences for individuals performing specified management office or operational functions in connection with the provision of facilities for gambling or a person who provides facilities for gambling;¹¹
 - (3) Maintaining a register of operating and personal licences;¹²
 - (4) Ensuring compliance with the Gambling Act 2005;¹³
 - (5) Investigating whether an offence has been committed under the Gambling Act 2005 and instituting criminal proceedings, whether in response to information received by the Commission or otherwise;¹⁴

⁹ Sections 22 and 1 of the Gambling Act 2005.

¹⁰ Part 5 and sections 65 and 67 of the Gambling Act 2005.

¹¹ Part 6 of the Gambling Act 2005.

¹² Section 106 of the Gambling Act 2005.

¹³ Section 27 of the Gambling Act 2005.

¹⁴ Section 28 of the Gambling Act 2005.

- (6) Publishing a statement of the principles to be applied by the Commission in exercising its functions under the Gambling Act 2005, and explaining how those principles are expected to assist the Commission in its pursuit of the licensing objectives;¹⁵
 - (7) Issuing codes of practice about the manner in which facilities for gambling are provided¹⁶ and about access to casino premises for children and young persons;¹⁷
 - (8) Issuing guidance as to the manner in which local authorities are to exercise their functions under the Gambling Act 2005 and, in particular, the principles to be applied;¹⁸
 - (9) Advising the Secretary of State about the incidence of gambling, the manner in which gambling is carried on, the effects of gambling and the regulation of gambling;¹⁹ and
 - (10) Employing or appointing enforcement officers with various powers under Part 15 of the Gambling Act 2005.²⁰
7. Any application for an operating licence must specify the activities to be authorised by the licence.²¹ In considering such an application, the Commission must have regard to (among other things) the licensing objectives, and must form and have regard to an opinion of the applicant's suitability to carry on the licensed activities.²² Accordingly, when considering a gambling licence application the Commission must have regard to whether granting the application would be in accordance with the objective of ensuring that gambling is conducted in a fair and open way.
8. In forming and having regard to such an opinion, the Commission may, in particular, have regard to (among other things) the financial and other circumstances of the applicant or of a

¹⁵ Section 23 of the Gambling Act 2005.

¹⁶ Section 24 of the Gambling Act 2005.

¹⁷ Section 176 of the Gambling Act 2005.

¹⁸ Section 25 of the Gambling Act 2005.

¹⁹ Section 26 of the Gambling Act 2005.

²⁰ Section 303 of the Gambling Act 2005.

²¹ Section 69(2)(a) of the Gambling Act 2005.

²² Section 70(1)(a) and 70(1)(b) of the Gambling Act 2005.

person relevant to the application (and, in particular, the resources likely to be available for the purpose of carrying on the licensed activities).²³ Any operating licence is subject to the condition that the licensee ensures compliance with any relevant social responsibility provision of a code of practice (as explained below) issued by the Gambling Commission.²⁴

9. As well as a fee for the initial application, holders of gambling licences must pay an annual fee which is based on their gross gambling yield (“GGY”). For example, annual fees for a remote general betting standard real events licence such as the one issued to BetIndex are divided into the following fee categories: F1 (Less than £550,000); F2 (£550,000 or greater, up to but excluding £2 million); F3 (£2 million or greater, up to but excluding £15 million); G1 (£5.5 million or greater, up to but excluding £15 million); G2 (£15 million or greater, up to but excluding £55 million); H1 (£55 million or greater, up to but excluding £110 million); I1 (£110 million or greater, up to but excluding £220 million); J1 (£220 million or greater, up to but excluding £550 million); K1 (£550 million or greater, up to but excluding £1 billion), and L1 (£1 billion or greater).²⁵ The amounts of the fees vary depending on the type of licence.

10. As part of its licensing function, the Commission has powers to specify and publish general conditions to be attached to each operating licence or each operating licence falling within a specified class²⁶ and to attach individual conditions to operating licences.²⁷ A condition may, among other things, relate to the financial circumstances of the licensee or of another person involved or likely to be involved in the conduct of the licensed activities; in particular, a condition may make provision about the maintenance of financial reserves in respect of potential liabilities.²⁸ The Commission also has powers to review

(1) the manner in which licensees carry on licensed activities and, in particular, arrangements made by licensees to ensure compliance with conditions attached to licences, in relation to operating licences of a particular description; and

(2) any matter connected with the provision of facilities for gambling, as authorised by an

²³ Section 70 of the Gambling Act 2005.

²⁴ Section 82 of the Gambling Act 2005.

²⁵ <https://www.gamblingcommission.gov.uk/licensees-and-businesses/licences-and-fees/remote-general-betting-standard-real-events-licence>

²⁶ Sections 75 and 76 of the Gambling Act 2005.

²⁷ Section 77 of the Gambling Act 2005.

²⁸ Section 77 of the 2015 Act.

operating licence if, among other grounds, the Commission has reason to suspect that activities may have been carried on in purported reliance on the licence but not in accordance with a condition of the licence, or for any reason suspects that the licensee may be unsuitable to carry on the licensed activities or thinks that a review would be appropriate.²⁹

11. Following such a review, the Commission has regulatory powers to

- (1) give the holder of an operating licence a warning;
- (2) attach an additional condition to a licence;
- (3) remove or amend a condition attached to a licence;
- (4) suspend the operating licence pursuant to section 118 of the Gambling Act 2005;
- (5) revoke the operating licence pursuant to section 119 of the Gambling Act 2005; or
- (6) impose a penalty under section 121 of the Gambling Act 2005.

12. The Commission has the power to suspend an operating licence if, following a review, the Commission thinks that any of the following conditions applies:

- (1) that a condition of the licence has been breached;
- (2) that the licensee has failed to cooperate with a review; or
- (3) that the licensee is unsuitable to carry on the licensed activities.

13. The Commission may also suspend an operating licence if, at the time of deciding to conduct a review or at any time during the course of a review, the Commission suspects that any of the above conditions apply.³⁰

²⁹ Section 116 of the Gambling Act 2005.

³⁰ Section 118(2) of the Gambling Act 2005.

14. In considering a licensee’s suitability to carry on licensed activities for the purposes of determining whether or not to suspend an operating licence the Commission may, in particular, have regard to, among other things, the financial and other circumstances of the licensee or of any person who exercises a function in connection with or is interested in the licensed activities (and, in particular, the resources available for the purpose of carrying on the licensed activities).³¹

(b) Statement of principles for licensing and regulation

15. The Commission’s Statement of principles for licensing and regulation dated June 2017 (“**the Statement of principles**”), issued pursuant to section 23 of the Gambling Act 2005, sets out the following general principles (among others):

Regulating gambling in the public interest

2.2 *The Commission regulates gambling in the interests of consumers and the wider public, having regard to, and in pursuit of, the licensing objectives in the Act. In doing so the Commission will work with licensees and other stakeholders and will ensure that it takes into account:*

- *the need to protect consumers and the wider public*
- *the need to maintain public confidence in the gambling industry and the Commission*
- *the importance of declaring and upholding proper standards of conduct and competence by licence holders.*

[...]

Consultation

[...]

2.5 *The Commission will adopt a precautionary approach when approaching new developments and interpreting evidence, where this is appropriate, having regard to its duty to promote the licensing objectives in the Act.*

[...]

Imposing the minimum burden necessary to promote the licensing objectives

2.7 *The Commission will ensure that its regulatory approach does not impose unnecessary regulatory burdens in upholding the licensing objectives in the Act, and does not unduly hinder the economic progress of licensees.*

³¹ Section 120(3)(c) of the Gambling Act 2005.

Requests for information

2.8 *The Commission will request only that information which it requires and will avoid duplicating requests by seeking to obtain information from government bodies...and other regulators (for example...the Financial Conduct Authority, and other gambling regulators) where it is possible, and appropriate, to do so.*

Adopting a risk-based approach

2.9 *The Commission will adopt a risk-based approach to regulation to ensure that its resources are concentrated where they are needed most and can be most effective.*

Proportionality

2.10 *The Commission will generally use the least intrusive regulatory tool to achieve compliance and will ensure that any regulatory action is proportionate to the importance of the matters to which it relates, having regard to its risk assessment.*

Promoting economic growth

2.11 *In deciding what action to take, and whether action should be taken at all, the Commission will have regard to the desirability of promoting economic growth and its duty to permit gambling in so far as the Commission thinks it reasonably consistent with pursuit of the licensing objectives.*

2.12 *The Commission will seek to provide a fair regulatory framework within which existing operators and new entrants can compete and grow with as limited a regulatory burden as is compatible with the protection of consumers, the protection of the wider public, and the upholding of the licensing objectives.*

Assisting in compliance

2.13 *The Commission will seek to support licensees in meeting their responsibilities through the provision of clear information, guidance and advice. However, the onus of responsibility for regulatory compliance is at all times on the licensee.*

Coordinating regulatory action

2.14 *The Commission will take coordinated regulatory action with government bodies and/or other regulators where it is appropriate to do so.*

16. The previous version of the Statement of principles, dated March 2015, had a different section 2.13 which stated:

Focusing on preventative activity

2.13 The Commission will focus on preventative activity only by keeping the gambling industry fully informed of the requirements of the regulatory regime and providing general information, advice and guidance, both on request and on its own initiative, with a view to aiding regulatory compliance...

17. The 2015 version of clause 2.13 therefore did not expressly state that the onus of responsibility for regulatory compliance was at all times on the licensee.
18. The 2017 Statement of principles also states that the Commission will apply the following principles in exercising its licensing functions under the Gambling Act 2005:

Licence applications

3.2 The Commission expects applicants for licences to provide the Commission with all the information it needs in order to determine whether or not they are suitable to hold a licence.

3.3 The Commission expects that licence applications will be complete and accurate at the point they are submitted to the Commission. It follows that, whilst applicants may be permitted to make minor changes to their proposals, the Commission will not permit applicants to make material changes to their application during the process. Material changes to an application are likely to result in an applicant being invited to withdraw their application and submit a new application, accompanied by the appropriate fee, or it may result in an application being refused.

[...]

Openness and cooperation

3.6 The Commission expects applicants to work with the Commission in an open and cooperative way and to disclose anything which the Commission would reasonably expect to know. The Commission will attach significant weight to an applicant's failure to work in an open and cooperative way when considering a licence application.

3.7 Withholding information from the Commission will also be treated as a strong contraindicator of an applicant's suitability to hold a licence, and the Commission will not grant licences to an operator if there is doubt about their ability to provide the information the Commission needs in order to exercise its functions.

[...]

The responsibility for protecting the licensing objectives

3.12 The Commission will hold an operator's senior operational staff and directors accountable for regulatory compliance and the protection of the licensing objectives...

19. The Commission states that it will apply the following principles in exercising its regulatory functions under the Act:

Operating licence holders

4.2 The Commission expects operators to:

- *conduct their business with integrity*
- *act with due care, skill, and diligence*
- *take care to organise and control their affairs responsibly and effectively and have adequate systems and controls to minimise the risks to the licensing objectives*
- *maintain adequate financial resources*
- *have due regard to the interests of consumers and treat them fairly*
- *have due regard to the information needs of consumers and communicate with them in a way that is clear, not misleading, and allows them to make a properly informed judgment about whether to gamble*
- *manage conflicts of interest fairly*
- *work with the Commission in an open and co-operative way*
- *comply with both the letter and spirit of their licence and associated Commission regulations*
- *disclose to the Commission anything which the Commission would reasonably expect to know.*

Senior positions and Personal Management Licence holders

4.3 The Commission expects those occupying senior positions, whether or not they hold Personal Management Licences, to:

- *uphold the licensing objectives and ensure compliance of operators with the LCCP*
- *organise and control their affairs responsibly and effectively*
- *have adequate systems and controls to keep gambling fair and safe*
- *conduct their business with integrity*
- *act with due care, skill and diligence*
- *maintain adequate financial resources*
- *have due regard to the interest of consumers and treat them fairly*
- *have due regard to the information needs of consumers and communicate with them in a way that is clear, not misleading, and allows them to make an informed judgment about whether to gamble*
- *manage conflicts of interest fairly*
- *disclose to the Commission anything which the Commission would reasonably expect to know*
- *work with the Commission in an open and cooperative way*

- *comply with both the letter and spirit of their licence, the licence of their operator, and associated Commission regulations.*

Personal Functional Licence holders

4.4 The Commission expects those holding Personal Functional Licences to:

- *conduct themselves with integrity*
- *act with due care, skill and diligence*
- *have due regard to the interests of consumers and treat them fairly*
- *work with the Commission in an open and co-operative way*
- *disclose to the Commission anything which the Commission would reasonably expect to know*
- *keep their skills and knowledge up to date.*

Dealing with issues that put the licensing objectives at risk

4.5 In approaching matters that put the licensing objectives at risk, the Commission's concern is to protect consumers and the wider public, and to raise standards in the gambling industry through targeted action. Our aims are to: reduce the risks to the licensing objectives; ensure that any lessons are shared with the wider gambling industry; and, deter other operators from acting in the same way. Where concerns have been raised about a licensee the Commission may commence an investigation. The approach adopted will be based on an assessment of the risks, the wider circumstances of the case and the range of options available.

Considering the outcome of investigations carried out by other regulators/ government agencies

4.15 The Commission expects operators to comply with the law, both in the UK and in other jurisdictions in which they, or related companies, operate. Failure to meet this expectation may raise questions about the continuing suitability of licence holders.

20. Further, the Commission states that its licensing, compliance and enforcement processes will ensure that the suitability of licence holders will be assessed on an ongoing basis as part of the Commission's compliance activities;³² that the Commission will seek to build and maintain good liaison and working relationships with local authorities, other regulators and law enforcement bodies, and will work closely with licensing authorities, other law enforcement agencies and other regulators to share relevant information and, where appropriate, investigate offences;³³ that the Commission will seek to ensure that appropriate advertising codes continue to be in place to prevent consumers from being misled,³⁴ and that the Commission will work

³² Paragraph 5.2.

³³ Paragraph 5.11.

³⁴ Paragraph 5.16.

with the Committee of Advertising Practice (“CAP”) and the Broadcasting Committee of Advertising Practice (“BCAP”) to develop advertising codes on gambling and will ensure that these are backed by effective enforcement action if those codes are breached.³⁵

(c) Licensing, compliance and enforcement under the Gambling Act 2005: policy statement

21. In its ‘Licensing, compliance and enforcement under the Gambling Act 2005: policy statement’, the Commission states that it carries out a regulatory risk assessment for licence holders which is based upon assessing the likelihood of risk presented by operators and the potential impact that the risk if realised will have upon the licensing objectives. Specifically, the Commission states that it “*will assess the likely impact of a risk based primarily on the size and market scope of an operator (actual or potential) and their previous regulatory history. This may include size of customer base, number of premises, turnover or gaming yield, and extent of licensed activity.*”³⁶ The Commission goes on to state that the risk assessment³⁷

...will determine the degree and type of regulatory engagement that may be required, although impact will be the primary consideration in this determination. The Commission considers that some operators will always be higher impact because of the size and scale, or nature of their operations. Those who have extensive operations (in terms of impact) or a significant market share will always receive a greater degree of regulatory oversight due to the market impact (actual or potential) should regulatory risk materialise or be identified. This is why additional information may be required at the licensing application stage and also why the Commission has adopted a relationship management approach (through identified staff) for certain high impact operators.

22. As to licensing, the policy statement provides that:

All applicants are required to supply the Commission with sufficient and complete information to support their application, and in particular information that will enable an assessment of their suitability to be made. However, the Commission takes a risk based and proportionate approach to the amount and detail of information an applicant is required to provide.

23. Further, the Commission states that when considering the suitability of an applicant it has regard to and seeks evidence to support and enable an assessment to be made against, among other things, “*financial and other circumstances of the applicant and/or person(s) relevant to the application, past and present. For operating licences this will include the resources likely to be available to carry out the*

³⁵ Paragraph 5.24.

³⁶ Paragraphs 2.2 and 2.13.

³⁷ Paragraph 2.14.

*licensed activities.*³⁸ However, this is qualified with the statement that *“The Commission does not purport to assess, on an ongoing basis, an operator’s solvency; the Commission is principally interested in financial stresses that might lead to an increased likelihood of compliance failures.”*³⁹

24. The frequency and focus of assessments, including visits is stated to be based on the risk assessment of the licensee.⁴⁰ In relation to complaints about licensees, the statement provides that *“Whilst the Commission does not have a specific statutory duty to investigate complaints about licensees, depending on the issues raised the Commission may decide to look into matters relating to the complaint.”*⁴¹

25. Of its general approach to publicity in enforcement cases, the Commission states:

7.4 In making decisions on publicity in enforcement cases, the Commission will at all times bear in mind the public interest, as well as the rights of individuals to a fair hearing, and the right to privacy enshrined in Article 8 of the European Convention on Human Rights. This means that the Commission will limit the release of information about on-going criminal or regulatory investigations, only releasing details when it has determined it is in the public interest to do so. This protects the integrity of investigations and protects individuals or operators from being unfairly associated with unsubstantiated allegations.

7.5 This means that the Commission will only announce publicly that it is investigating a matter in exceptional circumstances; it will only make such an announcement if it considers it is desirable to:

- *maintain public confidence in the gambling industry or the regulation thereof*
- *protect players*
- *prevent or deter widespread malpractice*
- *help the investigation itself, for example by bringing forward witnesses*
- *maintain the smooth operation of the gambling industry.*

7.6 In deciding whether to make an announcement, the Commission will consider the potential prejudice that it believes may be caused to any individuals or operators who are, or who are likely to be, a subject of the investigation.

7.7 The exceptional circumstances referred to above may arise where the matters under investigation have become the subject of public concern, speculation or rumour. In this case it may be desirable for the Commission to make public the fact of its investigation in order to allay concern, or contain any speculation or rumour.

³⁸ Paragraph 3.11.

³⁹ Paragraph 3.24.

⁴⁰ Paragraph 4.9.

⁴¹ Paragraph 4.16.

(d) Licence conditions and codes of practice

26. The Commission has published ‘Licence conditions and codes practice’ (“**LCCP**”) in versions dated April 2015, July 2016, April 2017, October 2018, May 2019 and January 2020.
27. The first part of the document sets out licence conditions. General licence condition 4.1.1, which applies to all remote operating licences with some exceptions, provides that licensees who hold ‘customer funds’ must ensure that these are held in a separate client bank account or accounts. ‘Customer funds’ are defined in 4.1.1(2) as meaning *“the aggregate value of funds held to the credit of customers including, without limitation:*
- a. cleared funds deposited with the licensee by customers to provide stakes in, or to meet participation fees in respect of, future gambling,*
 - b. winnings or prizes which the customer has chosen to leave on deposit with the licensee or for which the licensee has yet to account to the customer, and*
 - c. any crystallised but as yet unpaid loyalty or other bonuses, in each case irrespective of whether the licensee is a party to the gambling contract.”*
28. The definition of ‘customer funds’ in licence condition 4.1.1 does not include funds which the customer has wagered on a bet. Such wagered funds become the licensee’s monies and, in the case of Football Index, were removed from the customers’ wallets. In the period between the bet being placed and the outcome of the bet becoming known, the Commission’s expectation was that the licensee would manage its cash flow such that it had sufficient monies to cover its cash out exposure and ability to pay out winning bets.⁴²
29. All licensees must provide information to customers as to whether their money is protected in the event that the business were to go into liquidation. The intention of that requirement is to assist consumers in deciding who to gamble with and how much money to leave in their accounts. There are 3 levels of protection: not protected, medium protection and high protection. Medium protection can be achieved in a variety of ways, such as by having insurance, but does not guarantee that customers will be able to have access to their money in the event of the licensee going into liquidation.
30. Whilst the licensee is required in its terms and conditions to make clear which level applies to

⁴² GC Response to written questions from the Review.

the funds belonging to its customers, the Commission has told the Review that it does not approve the licensee's assessment of the level of protection, though it may check the accuracy of the rating chosen.⁴³

31. General licence condition 15.2.1 mandates the reporting to the Commission of certain key events (“**Key Events**”) which “*could have a significant impact on the nature or structure of a licensee’s business*” as soon as reasonably practicable and in any event within five working days of the licensee becoming aware of the event’s occurrence. Such Key Events include:

- (1) In the case of licensees which are companies, a petition being presented for their winding up or the winding up of any group company of theirs, or they or any group company being placed in administration or receivership or their directors proposing to creditors a composition in satisfaction of its debts or a scheme of arrangement of its affairs; and
- (2) Any change in the licensee’s arrangements for the protection of customer funds in accordance with the general licence condition 4 relating to the protection of customer funds.

32. The second part of the LCCP sets out the Code of Practice, which contains two types of provisions: (1) social responsibility provisions, compliance with which is a condition of licences and breach of which may lead the Commission to review the licence with a view to suspension, revocation or the imposition of a financial penalty and expose the operator to the risk of prosecution, and (2) ordinary code provisions which set out good practice (which may be taken into account by the Commission in the exercise of its functions, including on a licence review, but cannot lead to the imposition of a financial penalty).⁴⁴

33. Social responsibility code provision 5.1.6, which applies to all licences except lottery licences, states (among other things) that “*Licensees must comply with the advertising codes of practice issued by the Committee of Advertising Practice (CAP) and the Broadcast Committee of Advertising Practice (BCAP) as applicable. For media not explicitly covered, licensee should have regard to the principles included in these codes of practice as if they were explicitly covered.*”

⁴³ GC Response to written questions from the Review.

⁴⁴ 2018 LCCP p30.

34. Ordinary code provision 8.1.1, which applies to all licences, provides:

- 1 *...the Commission expects licensees to work with the Commission in an open and cooperative way and to inform the Commission of any matters that the Commission would reasonably need to be aware of in exercising its regulatory functions. These include in particular matters that will have a material impact on the licensee's business or on the licensee's ability to conduct licensed activities compliantly and consistently with the licensing objectives.*
- 2 *Thus, licensees should notify the Commission, or ensure that the Commission is notified, as soon as reasonably practicable and in such form and manner as the Commission may from time to time specify, of any matters which in their view could have a material impact on their business or affect compliance. The Commission would, in particular, expect to be notified of the occurrence of any of the following events in so far as not already notified in accordance with the conditions attached to the licensee's licence:
a any material change in the licensee's structure or the operation of its business...*

35. The October 2018 version of the LCCP (published after BetIndex's licence had already been granted in 2015) introduced licence condition 7.1.1 ('Fair and transparent terms and practices') which provides:

1. *Licencees must ensure that the terms on which gambling is offered, and any consumer notices relating to gambling activity, are not unfair within the meaning of the Consumer Rights Act 2015. Licencees must comply with those terms.*
2. *The contractual terms on which gambling is offered and any consumer notices relating to gambling activity must be transparent within the meaning of the Consumer Rights Act 2015. The contractual terms on which gambling is offered must be made available to customers in an easily accessible way.*
3. *Licencees must ensure that changes to customer contract terms comply with the fairness and transparency requirements under the Consumer Rights Act 2015. Customers must be notified of material changes to terms before they come into effect.*
4. *Licencees must ensure that they do not commit any unfair commercial practices within the meaning of the Consumer Protection from Unfair Trading Regulations 2008, at any stage of their interactions with consumers.*

(2) Range of regulated gambling activities

36. The Commission regulates 'gambling', which includes gaming, betting and participating in a

lottery.⁴⁵ Betting is defined as making or accepting a bet on the outcome of a race, competition or other event or process, or the likelihood of anything occurring or not occurring, or whether anything is or is not true,⁴⁶ and prize competitions.⁴⁷ Section 10 of the Gambling Act 2005, however, provides that the definition of a bet under section 9 does not include a bet the making or accepting of which is a regulated activity within the meaning of section 22 of the Financial Services and Markets Act 2000 (“**FSMA**”). Bets falling within section 22 of FSMA are therefore not regulated by the Gambling Commission, but rather by the FCA.

(3) Resources

37. In assessing the extent of the Commission’s achievement of the licensing objectives and its regulatory responsibilities, it is necessary to consider the extent of the resources available to it.⁴⁸ In 2015, at the time of BetIndex’s application for a gambling licence, the Commission’s Licensing division had 46 employees undertaking a variety of work including considering applications for personal and operating licences, licence changes and variations, review of regulatory returns, review and actioning of key events and administrative and officer duties relating to around 3,000 operators and 30,000 personal licence holders.⁴⁹ In the financial year 2015/16 the Commission received 273 new operating applications, of which 93 included betting activities.⁵⁰
38. The Commission’s Compliance division currently consists of 35 people, 8 of whom are focussed on the National Lottery. It has oversight of around 2,800 licensees and the National Lottery.⁵¹ The Commission has told the Review that prior to November 2014, when the Gambling (Licensing and Advertising) Act 2014 came into force, only a minority of the Compliance team specialised in remote operators (the majority being focussed on land-based gambling), but that since that time the Commission has been making changes in order to ensure a skill set focussed online and to address growing complexity within the industry.⁵²

⁴⁵ Section 3 of the Gambling Act 2005.

⁴⁶ Section 9(1) of the Gambling Act 2005.

⁴⁷ Section 11 of the Gambling Act 2005.

⁴⁸ For the purposes of comparison, a similar consideration of the FCA’s resources is set out at paragraphs 58 to 59 below.

⁴⁹ GC Response to written questions from the Review.

⁵⁰ GC Response to written questions from the Review.

⁵¹ GC Response to written questions from the Review.

⁵² GC Response to written questions from the Review.

39. The Commission has told the Review that since 2015 it has seen significant shifts in the gambling market reflecting wider technological and consumer trends in society, in particular a shift to online gambling. This period of rapid growth has also seen an increase in the complexity of business models and product offerings, with the lines between betting as defined in the Gambling Act 2005 and other types of products becoming increasingly blurred.⁵³
40. Whilst the Commission's 2015/16 income was around £19.21 million excluding grant in aid funding for National Lottery functions, with 290 staff, the equivalent income for 2020/21 is £18.87 million, with 338 staff overseeing around 2,800 firms and 16,500 individuals.⁵⁴ The Review understands that increased licence fees for online operators are to come into force from October 2021.

(4) Sharing of information with other regulators

41. The Commission has powers under section 30(1) and Schedule 6 of the Gambling Act 2005 to provide information received by it in the exercise of its functions to certain persons or bodies specified in Schedule 6, including the FCA, either (a) for use in the exercise of the person's or body's functions, or (b) for the purpose of a function of the Commission. Under section 30(2) of the Gambling Act 2005, any of the persons or bodies listed in Parts 1 or 2 of Schedule 6, including the FCA, may provide to the Commission, for the purpose of exercise of its functions, information received by the person or body in the exercise of his or its functions.

B. Relevant regulatory framework for the FCA

(1) Principles of regulation

42. The FCA is a regulator for the financial services industry, an independent public body which took over most of the functions of the Financial Services Authority ("FSA") with effect from 24 January 2013.⁵⁵ The FCA has functions conferred on it by or under FSMA.⁵⁶ In discharging its general functions the FCA must, so far as is reasonably possible, act in a way which is

⁵³ GC Introduction to Responses to written questions from the Review.

⁵⁴ GC Introduction to Responses to written questions from the Review.

⁵⁵ Section 1A of FSMA (as amended by the Financial Services Act 2012).

⁵⁶ Section 1A(3) FSMA.

compatible with its strategic objective and advances one or more of its operational objectives.⁵⁷

43. The strategic objective of the FCA is to ensure that the relevant markets (defined in section 1F of FSMA to include the financial markets and the markets for regulated financial services) function well. The FCA's operational objectives are:

- (1) the consumer protection objective (securing an appropriate degree of protection for consumers);⁵⁸
- (2) the integrity objective (protecting and enhancing the integrity of the UK financial system);⁵⁹ and
- (3) the competition objective (promoting effective competition in the interests of consumers in the markets for regulated financial services or certain other services).⁶⁰

44. The Treasury has powers pursuant to section 22(5) of FSMA to amend the RAO, including making changes to alter the boundaries of the FCA's regulatory perimeter.

45. In discharging its general functions, the FCA must also have regard to the regulatory principles⁶¹ which include, among other things:

- (1) the need to use the resources of each regulator in the most efficient and economic way;
- (2) that a burden or restriction which is imposed on a person, or on the carrying on of an activity, should be proportionate to the benefits, considered in general terms, which are expected to result from the imposition of that burden or restriction;
- (3) the desirability of sustainable growth in the economy of the United Kingdom in the medium or long term; and

⁵⁷ Section 1B(1) FSMA.

⁵⁸ Sections 1B(3) and 1C FSMA.

⁵⁹ Sections 1B(3) and 1D FSMA.

⁶⁰ Sections 1B(3) and 1E FSMA.

⁶¹ Section 1B(5)(a) FSMA.

(4) the general principle that consumers should take responsibility for their decisions.

(2) Regulated activities

46. Under FSMA no person may carry on a regulated activity (as defined in section 22 of FSMA) in the United Kingdom, or purport to do so, unless he is (i) an authorised person, (ii) an exempt person, or (iii) a relevant exclusion in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001/544 (“**the RAO**”) applies (known as the “general prohibition”).⁶² Contravention of the general prohibition is a criminal offence.

47. By section 22 of FSMA, regulated activities include, among other things, an activity of a kind specified in the RAO carried on by way of business and relating to an investment (defined as “any asset, right or interest”) of a kind specified in the RAO. Examples of specified investments include shares (listed and unlisted); derivative instruments such as options, futures and contracts for differences (“**CFD**”); collective investment scheme units and debt securities, such as debentures, bonds, commercial paper and government securities.⁶³

48. Among the activities specified in the RAO is “*Buying, selling, subscribing for or underwriting securities or contractually based investments...as principal.*”⁶⁴ The investments specified in the RAO include:

(1)...rights under

(a) a contract for differences; or

(b) any other contract the purpose or pretended purpose of which is to secure a profit or avoid a loss by reference to fluctuations in

(i) the value or price of property of any description; or

*(ii) an index or other factor designated for that purpose in the contract.*⁶⁵

49. Part 4A of FSMA governs applications for authorisation to the FCA by firms, which must meet certain threshold conditions set out in Schedule 6 to FSMA, including that the firm’s business model (that is, its strategy for doing business) must be suitable for a person carrying on the regulated activities that the firm carries on or seeks to carry on,⁶⁶ and the firm having

⁶² Section 19 FSMA.

⁶³ See Part III RAO.

⁶⁴ Article 14(1) RAO.

⁶⁵ Articles 73 and 85 RAO.

⁶⁶ Paragraph 2F of Schedule 6 to FSMA.

appropriate resources.⁶⁷

50. The FCA has told the Review that as a Jersey firm operating out of an office in the UK, the only way in which BetIndex could have become subject to regulation by the FCA would have been for BetIndex to make an application for authorisation under Part 4A of FSMA, and for the FCA to approve that application. In determining such an application, the FCA would need to be satisfied that the activity being undertaken by the firm was a regulated activity as set out in the RAO, carried on by way of business in the UK. The FCA has told the Review that (although the Review has seen no evidence that the issue was considered at the time), in principle, given that BetIndex was incorporated in Jersey, there could have been a question as to whether or not the firm was carrying out a regulated activity in the UK.⁶⁸

51. Part 15 of FSMA provides for the establishment of the Financial Services Compensation Scheme to compensate persons in cases where, for example, relevant persons (meaning “(a) *an authorised person at the time the act or omission giving rise to the claim against him, or against a successor falling within subsection (1)(b), took place*” or “(b) *an appointed representative at the time*”) are unable, or unlikely to be able, to satisfy claims against them.⁶⁹

(3) Rules and guidance

52. The FCA has the power to make general rules applying to authorised persons carrying on regulated or unregulated activities,⁷⁰ and to give guidance consisting of such information and advice as it considers appropriate (a) with respect to the operation of specified parts of FSMA and of any rules made by the FCA, (b) with respect to any other matter relating to the functions of the FCA, and (c) with respect to any other matters about which it appears to the FCA to be desirable to give information or advice.⁷¹

53. Much of the advice issued by the FCA is set out in the FCA Handbook (which provides the rules, guidance and other provisions made by the FCA in a consolidated online form). However, a person (including a company) may also make requests for individual guidance from

⁶⁷ FCA Response to written questions from the Review.

⁶⁸ FCA Response to written questions from the Review.

⁶⁹ Section 213 FSMA.

⁷⁰ Section 137A FSMA.

⁷¹ Section 139A FSMA.

the FCA, which relates to that person's own particular circumstances or plans (as set out in the Supervision or "SUP" section of the FCA Handbook).⁷² Requests for individual guidance may be made in writing or orally.⁷³

54. The section of the FCA Handbook relating to requests for individual guidance provides that

*The FCA will aim to respond quickly and fully to reasonable requests. The FCA will give high priority to enquiries about areas of genuine uncertainty or about difficulties in relating established requirements to innovative practices or products. What constitutes a 'reasonable request' is a matter for the FCA. It will depend on the nature of the request and on the resources of the firm or other person making it. The FCA will expect the person to have taken reasonable steps to research and analyse a topic before approaching the FCA for individual guidance. The FCA should not be viewed as a first port of call for guidance, except where it is only the FCA that can give the guidance, for example in confirming non-standard reports that it wishes to receive from a firm.*⁷⁴

55. As to the information required by the FCA in order to consider requests for individual guidance, the Handbook states:

*The FCA will always need sufficient information and time before it can properly evaluate the situation and respond to a request. If a request is time-critical, the person or its professional adviser should make this clear. The more notice a person can give the FCA, the more likely it is that the FCA will be able to meet the person's timetable. However, the time taken to respond will necessarily depend upon the complexity and novelty of the issues involved. In making a request, a person should identify the rule, general guidance, or other matter on which individual guidance is sought, and provide a description of the circumstances relating to the request. The FCA may request further information if it considers that it does not have sufficient information.*⁷⁵

56. As to reliance on FCA individual guidance, the FCA Handbook states:

*The extent to which a person can rely on individual guidance given to him will depend on many factors. These could include, for example, the degree of formality of the original query and the guidance given, and whether all relevant information was submitted with the request. Individual guidance is usually given in relation to a set of particular circumstances which exist when the guidance is given. If the circumstances later change, for example, because of a change in the circumstances of the person or a change in the underlying rule or other requirement, and the premises upon which individual guidance was given no longer apply, the guidance will cease to be effective.*⁷⁶

⁷² SUP 9.1.2G.

⁷³ SUP 9.2.1G.

⁷⁴ SUP 9.2.5G.

⁷⁵ SUP 9.2.6G.

⁷⁶ SUP 9.4.2G.

57. The Handbook states expressly that “*If the circumstances relating to individual guidance change it will be open to a person to ask for further guidance*”⁷⁷ and makes clear that “*Rights conferred on third parties (such as a firm’s clients) cannot be affected by guidance given by the FCA. Guidance on rules, the Act or other legislation represents the FCA view, and does not bind the courts...A person may need to seek his own legal advice.*”⁷⁸

(4) Resources

58. In 2019 the FCA was the conduct regulator for approximately 59,000 financial services firms in the UK and 152,000 approved persons.⁷⁹ It was also the prudential supervisor for approximately 48,000 of those firms.⁸⁰ Its budget for 2019/2020 was £558.5 million.⁸¹ There have been a number of increases to the scope of the activities regulated by the FCA since 2015. For example, from 10 January 2020 the FCA became responsible for supervising the compliance of crypto asset firms with anti-money laundering (“**AML**”) legislation.

59. Since 2019 the FCA has published an annual Perimeter Report which seeks to provide clarity to stakeholders on the FCA’s role and set out specific issues which have arisen.⁸² The foreword to the 2019/20 FCA Perimeter Report states:

What products or services should fall under the FCA’s remit, and to what extent, is a complex question. The ‘perimeter’ between what we regulate and we don’t regulate can be difficult for consumers to understand and can challenge our regulatory oversight. This is compounded by several factors:

- *firms we regulate may also offer unregulated products where consumers do not benefit from protections afforded by regulation*
- *firms (sometimes deliberately) act on the edge of our perimeter, offering products and services that are similar to a regulated financial services activity, but are unregulated*
- *there are differences between our perimeter, the scope of the Financial Ombudsman Service (FOS), and the scope of the Financial Services Compensation Scheme (FSCS)*

⁷⁷ SUP 9.4.3G.

⁷⁸ SUP 9.4.4G.

⁷⁹ For the purposes of comparison, a similar consideration of the Commission’s resources is set out at paragraphs 37 to 40 above.

⁸⁰ FCA Business Plan 2019/20 p.6. <https://www.fca.org.uk/publication/business-plans/business-plan-2019-20.pdf>

⁸¹ FCA Business Plan 2019/20 p.47.

⁸² FCA Response to written questions from the Review.

The complexity of the perimeter reflects the complexity and diversity of financial services. It is not defined by a single piece of legislation or regulatory approach, and any changes to the perimeter are a matter for the Government and Parliament and requires [sic] new legislation. This can present challenges keeping pace with changes in markets, where new products and services emerge that do not easily fit within existing approaches.

The landscape in which we operate also presents its own challenges. Technology and the use of data are constantly driving change, as new products and services are rapidly accessible to a large number of consumers. This trend is likely to become more common in the future, and whilst we will need to carefully consider the benefits of new services, it is also the case that the perimeter is likely to be tested more often as a result.⁸³

(5) Sharing of information

60. By section 348(1) of FSMA confidential information (information which relates to “*the business or other affairs of any person*” and was received by the FCA for the purposes of, or in the discharge of, any of its functions⁸⁴) must not be disclosed by the FCA⁸⁵, or by any person obtaining the information directly or indirectly from the FCA, without the consent of (a) the person from whom the FCA obtained the information; and (b) if different, the person to whom it relates, unless it has been disclosed to the public in defined circumstances, or it is “*in the form of a summary or collection of information so framed that it is not possible to ascertain from it information relating to any particular person.*”⁸⁶

61. However, section 349 of FSMA allows the FCA to disclose confidential information (without consent) where the disclosure is made for the purpose of facilitating the carrying out of a public function, and permitted under the Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001 (“**the Disclosure Regulations**”). Regulation 3(1) of the Disclosure Regulations permits disclosure of confidential information when it is made to any person by the FCA for the purposes of enabling or assisting FCA to discharge any of its public functions, and Regulation 12(1)(a) of and Schedule 2 to the Regulations permits the FCA to disclose information to the Commission for the purpose of enabling or assisting the Commission to discharge its functions as such.

⁸³ <https://www.fca.org.uk/publication/annual-reports/perimeter-report-2019-20.pdf> at p3.

⁸⁴ Section 348(2) FSMA.

⁸⁵ Section 348(5) FSMA.

⁸⁶ Section 348(4) FSMA.

BetIndex Report Chapter 4 - BetIndex Limited

1. This Chapter contains the Review’s account of:
 - A. The development of the Football Index product and its key features:
 - B. The growth of BetIndex and the changes to its key features:
 - C. Events leading to the suspension of BetIndex’s licence and administration.
2. Chapters 5 and 6 of the Report deal with the actions taken by the Commission and the FCA in relation to the regulation of BetIndex. The Review’s Terms of Reference are described in chapter 1. The Review is concerned with the actions of regulatory bodies in relation to BetIndex Limited. It is not a review of the actions of BetIndex or of its directors and personnel. This chapter therefore provides such detail as is necessary to consider the regulatory position.

A. The development of the Football Index product

3. BetIndex Limited⁸⁷ trading as Football Index (“**BetIndex**”) launched the Football Index product in October 2015, having been granted a Remote General Betting Standard Real Event operating licence by the Gambling Commission on 9 September 2015 in the circumstances set out in chapter 5.
4. Prior to its launch by BetIndex, the Football Index product had been developed over a number of years, including by BetIndex’s parent company Fame Ventures Ltd.⁸⁸
 - a. In around 2011 a game known as ‘FameIndex’ was proposed. The FameIndex game was based on the issuing of units in celebrities called “Famepledges” which could be traded on an online platform.
 - b. In September 2014 Fame Ventures made an application for a gambling licence in relation to a game which was also called FameIndex. As with the original proposal, players of the game could buy ‘Pledges’ in listed celebrities, but those Pledges now

⁸⁷ Company registration number 119040.

⁸⁸ Company registration number 08283149. The parent company’s name was subsequently changed to Index Labs Limited on 4 December 2019.

represented a wager that the celebrity would reach the top of the daily ‘Buzz Chart’, thus entitling the player to a fixed payout per pledge. The ‘Buzz’ score for each celebrity was to be based on a trending metric measuring the change in volume of social chatter around that celebrity.⁸⁹ Fame Ventures had also developed a game called Football500, but stated that it was focussing at that time on the initial launch of FameIndex.

- c. In an email to the Commission on 29 October 2014 Fame Ventures stated that it was looking at possible options that might allow players to trade or swap bets in the future, but was focussing on refining the core gambling proposition. A member of the Commission’s Licensing Division replied on 6 November 2014 stating *“If the decision is made to allow players to trade or swap bets you must notify the commission prior to its launch and provide full details as this may require a further licence.”* Fame Ventures stated in its response that *“In the event of a future development of the game allowing players to swap/trade bets we will notify Commission prior to launch with full details.”*
5. On 8 January 2015 Fame Ventures applied for a General betting (standard) (real events) licence and a Gaming machine technical software licence for a game which, for the first time, used the name Football Index. These licences were granted by the Commission on 27 March 2015. The Game Play Rules for Football Index as at 8 January 2015 provided that:
 - a. To play the game customers would have to register an account and fund the account with a minimum of £5.
 - b. Football players and managers known as ‘Names’ would be listed on the website under either the ‘1st Team’ or the ‘Squad List’.
 - c. Players could buy units known as ‘Futures’ in the Names in the 1st Team at a price published on the website. The Futures would be valid for a period of 3 years from issue, after which date they would become null and void.
 - d. The price of the Future would be determined by demand – the more popular the

⁸⁹ Parts of the application referred to the game as ‘Fame500’, but the game had been rebranded as ‘FameIndex’.

Name the higher the price.

- e. Customers could buy up to a maximum of 20 Futures in a single transaction, provided that they had sufficient funds in their account.
 - f. The Futures were stored in a section of each customer's online account known as the 'Portfolio'.
 - g. The holders of Futures in the Name with the highest daily score by 12am on "FootballBuzz", a list based on a daily monitor of all UK online football news, would win a fixed payout of 20p per Future known as a 'Dividend' ("**Dividend**") paid into their accounts.
 - h. Each Future was therefore described as *"a remote fixed-odds bet on who will be Daily Buzz Winner"*.
 - i. Fame Ventures reserved the right to vary the quantum of the Dividend with due notice to all customers.
 - j. Whilst no Future could be bought in Names on the Squad List, customers could cast votes (gained as a reward for logging in, sharing and other activities) for Names on the Squad List to move up or down. Every Friday the two Squad Names with the highest aggregate number of votes would be 'promoted' to the 1st Team at an issue price of £1. Once 250 Names were in the 1st Team, then each week 2 Names from the 1st Team would also be relegated into the Squad. Upon relegation all Futures associated with that Name would become null and void and be removed from the customer's portfolio.
6. As originally licensed, the essence of the Football Index product was therefore the placing of a stake on a fixed odds bet which ran for three years. Players of the game would hope to receive more in "Dividends" over the period of their bet than the value of their stake. To achieve this they would have to buy "Futures" in players that went on to be most frequently mentioned in online football news.

7. It is relevant to note that the originally licensed version of Football Index already used language that is usually associated with the financial markets and investments. The words “Dividend”, “Futures” and “portfolio” were all used and the word “index” itself is commonly associated with financial indices such as the FTSE Index 100. This language was used before there was any feature for bets to be “traded” before their expiry.
8. Shortly after the grant of the licences, two significant changes to the Football Index rules were proposed. On 17 April 2015 Fame Ventures proposed changes to the game rules, both of which were stated to be designed to shorten the duration of the bet (from the 3 years provided in the original rules) and to give players *“more control and flexibility over managing those bets”*. The proposed changes were:
 - a. To allow for relegation each week of the two footballers at the bottom of the 1st Team to the Squad (with bets in the relegated players being closed as a loss), and the corresponding promotion of the two footballers at the top of the Squad to the 1st Team; and
 - b. For the first time, to allow players the option to ‘cash out early’ from their Futures and receive payment should they decide to bring the bet to a conclusion before the end of its three-year duration. This was achieved by the player wishing to sell their Shares clicking on ‘Join Sell Queue’ on the Shares he wishes other users to buy, thus creating a ‘Sell Order’. BetIndex would cash out the Bet subject to finding another user who would ‘buy’ the Sell Order. BetIndex did not guarantee a price, but a seller could set a lowest price at which they would accept another user to buy the Sell Order.

On 20 April 2015 the Commission responded to Fame Ventures stating *“Thank you for notifying the Commission that Fame Ventures Limited is due to undergo...a change to the game rules.”*

B. The growth of BetIndex and the changes to its key features

9. BetIndex, rather than Fame Ventures, applied for a licence to operate the Football Index product in July 2015. The Game Play Rules submitted with BetIndex’s application were identical to the version submitted in January 2015 as part of Fame Ventures’ application.

The only exceptions were that 'BetIndex' was substituted for 'Fame Ventures' and there were two changes to the list of definitions. Significantly, the "cash out" facility that Fame Ventures had notified to the Commission on 17 April 2015 did not feature in the rules.

10. As set out in more detail in Chapter 5, the Commission issued the licence to BetIndex on 9 September 2015 and the Football Index website was launched in October 2015.
11. On 18 December 2015, BetIndex's CEO contacted the Commission to advise that BetIndex was looking to change the manner in which 'Dividend' winnings on Football Index would be paid out and querying whether a variation to the licence would be required. Rather than a fixed 20p payout on each Dividend, BetIndex proposed making the Dividend a fixed percentage of its daily revenue from bets. BetIndex subsequently decided against making the proposed changes.
12. In either March or the third quarter of 2016 (the materials supplied to the Review do not allow it to determine which) BetIndex added an 'instant sell' function on the Football Index website, allowing BetIndex to buy back Shares from players at a price determined by BetIndex. BetIndex later explained that during the first nine months of trading, when BetIndex was building its first active user base, it was not in a position to settle Sell Orders quickly because there was insufficient liquidity in the market and some Sell Orders were taking many days if not weeks to be matched.
13. The 'instant sell' function was designed to address this, as it gave customers the option to sell their Shares to BetIndex instantly at a discount to the prevailing price or (as per the existing 'go-to-market' facility) to put the sell order in a sell queue where their Shares would be sold at the market price once a buyer was found. Instant sell was later described by BetIndex as an immediate success, helping it to grow activity per user substantially over the second half of 2016. By this time the Football Index iPhone Operating System (IOS) app had been launched, and by the end of 2016 new customers had reached 60,000 registrations of which over 20,000 were depositors.
14. Football Index was given a full marketing launch in the third quarter of 2016, and conducted marketing campaigns in 2017 using outdoor poster, radio and television advertising, and sponsoring highlights of international football games on ITV. In 2017 the

company received £2 million of investment. Football Index also introduced new terms of use in 2017.

15. On 21 August 2017 BetIndex submitted a Key Event notifying the Commission that, as of 19 August 2017, it had launched a new fixed odds feature to the Football Index website known as “Performance Buzz”, which analysed the performance of famous footballers across the top leagues in Europe as well as the two main European football tournaments. Customers had been notified by email and amended terms and conditions would be presented to customers upon their next login to the website. The effect of the change was to extend the win mechanic for the payment of Dividends (i.e. the events in relation to which Dividends would be paid out) from footballers’ ‘media mentions’ (as it had been to date) to include the footballers’ performance on the pitch. BetIndex also introduced a feature called ‘The Squad’, a database of a further 1600 footballers in addition to the 200 footballers in ‘The Top 200’.

16. By March 2018 BetIndex had more than doubled its customer base to 150,000 registrations and 65,000 depositors. The company recorded its first month of over £1 million GGY. Over the course of 2018 the company’s licence fee category had to be increased twice from F2 to G1, and then from G1 to G2 (the fee categories are explained in Chapter 3).⁹⁰

17. On 4 March 2018 in response to a request for information from the Commission about BetIndex’s financial position as a result of increased GGY, BetIndex confirmed that it had grown over the previous 2 years moving from a tier F-1 through to F-3 category operator. The letter described the business in the following terms:

BetIndex sells ‘bets’ in Footballers based on their ‘future performance’ both in the media (a digital version of ‘media mentions’) and on the pitch (points scored as per fantasy football powered by Opta). Holders of the bets are rewarded with ‘micro-wins’ daily known as ‘dividends’.

User’s [sic] have the opportunity to ‘sell their bet’ which is effectively a ‘cash out early’ as each bet is valid for a total of 3 years or until the player retires, whichever shall be the shorter.

18. On 4 April 2018 Fame Ventures’ remote operating licence was amended to authorise Fame Ventures to manufacture, supply, install or adapt gambling software.

⁹⁰ GC Response to written questions from the Review.

19. On 22 January 2019 BetIndex applied for an operating licence to allow a new entity called BetExchange to act as an intermediary in operating the Football Index platform. While the application was rejected, it contained a business plan on behalf of BetExchange dated December 2018 which described the business model and its development to date: This provides a helpful summary of how significantly the Football Index product had changed since BetIndex applied for a licence in July 2005.
20. The Football Index business model was described in January 2019 as follows:
- a. Revenue was earned through selling bets known as equity or ‘Shares’ in footballers to customers. Each Share was a fixed-odds bet that the player selected would top the media ranking and/or the performance ranking at midnight on any day and thus earn cash Dividends.
 - b. Shares could be issued by BetIndex or fulfilled by another customer selling his Share in the same player. The two orders (buy and sell) were matched but all relationships were solely between the customer and BetIndex. The seller would be ‘cashed out’ and a new bet issued to the buyer.
 - c. Buyers could buy up to 100 Shares at the published price on screen, whether bought from BetIndex or from a selling customer. Each bet had a lifetime of 3 years, during which time player values could rise and fall in line with the player’s on-pitch performance and “customers’ expectations”.⁹¹ At the end of the three years the customer’s bet would be cancelled, though the bet could be sold prior to its expiry.
 - d. The Football Index system consisted of two core lists: The Top 200 and The Squad. The Top 200 was a list of 200 football players which could be traded at the prevailing published price. Only players in the Top 200 were eligible for the media Dividend. Players at the bottom of The Top 200 list could be relegated. As the market progressed the price of star players was likely to increase, making their

⁹¹ Presumably the “customer expectations” referred to the value changing depending on customer demand for Shares in that particular player.

Dividend yield lower. The Squad was a database of a further 1600 footballers, onto which new players were “TPO’ed” each month.

- e. Dividends were split into two categories: those payable as a result of player “*media hits*” and those payable for actual player performance on the pitch. Dividends were stated to be a key driver of Share prices and Dividend yield was a “*key valuation parameter*” in judging the relative value of each player. A player with a low Share price would have a far higher Dividend yield as the Dividends payable daily were distributed only amongst those customers of the daily winning player.
- f. The media list was an “*aggregator of 25 news feeds from the UK’s top publishers... The scoring algorithm used by Football Index does not simply aggregate the number of player mentions in the daily articles but refines the score by adjusting for the sentiment of those mentions; is the media reporting a footballer in a positive manner, or a negative light? The company monitors articles and sentiment throughout the course of a day and the more a footballer is mentioned in a positive light the greater the number of points they will accumulate. The footballer with the most points at the end of the day is the media dividend winner. The scoring model assesses each article and scores it based on mentions of footballers using an open source sentiment analysis model called AFINN-111. Media dividends are paid out every day, including match days when they are paid out only to the highest ranking player and at a reduced level.*”
- g. The performance Dividend was based on a “*proprietary daily monitor of footballing performance across the top leagues in Europe.*” On each day there was an eligible football match, the company ranked all the participating footballers according to a list of weighted statistics called The Football Index Scoring Matrix. On match days, the performance Dividend was paid out in accordance with the Dividend payment matrix, which provided for payments of between 2p and 12p based on the number of matches being played that day.
- h. The Football Index pricing mechanism was based on “*The Buy and Sell delta*”. Each time a Share in a footballer was purchased, the subsequent price was increased by a small fraction of a penny (the number being known as the ‘buy delta’). The buy and sell deltas performed “*the function that a market maker would in a stock exchange in establishing prices in the market*” and both were controlled by a pricing algorithm in

which “The size of a buy delta is set as a function of the size of the market, and the volume of shares traded - the bigger the market the lower the deltas. This figure is adjusted as the market either grows or contracts. Price windows allow the company to vary deltas according to different share prices – these windows range from between £0.01p to over £15.00. The Buy Delta for lower priced shares can be less, as proportionately the Delta will have a higher impact. The company sets price deltas so that price decreases are faster than price increases to allow the company to make a margin in a declining market. The delta ratio would thus be in excess of 1. For example, if 10,000 shares are issued for £30,000 but buying them back (if necessary) at a cost of £25,000 would yield a margin of £5,000. The company has some freedom in establishing the quantum of this margin. Deltas will decrease at the higher and lower ends of the price spectrum creating resistance for shares to increase much beyond, say £5, or much lower than, say, 40p. All deltas once set vary automatically by pre-set percentages as the market either grows or contracts to make sure that price changes reflect the dynamics of the market.”

- i. The heart of the Football Index business model was “the mechanism for turning a fixed odds bet into a tradable instrument. It is a fixed odds bet on the future performance of a player. It is a contractual obligation that has value and may be traded.” The platform allowed customers to cash in their bets early, with the amount determined by how much another customer was prepared to pay for that bet. Although the transaction resembled a sale of Shares between customers, in reality BetIndex closed the seller’s bet and wrote a new bet for the buying customer. This would reset the three-year time period for which Dividends were available.
- j. In the next phase of development, “buy and sell order books” would be added to give players greater flexibility and trading functionality “fully turning a bet into a tradeable security at a price freely and transparently established by the market in the short term.”

21. The business model provided a worked example of a hypothetical trade in Shares in the footballer Neymar:

1. In month one Customer A buys 10 Neymar shares at a price of £10 per share. The company books this as cash flow with a gross gaming revenue of one hundred pounds.

2. In month two the price of Neymar shares has risen to £12 and Customer A elects to sell all his shares for £120, creating a cash outflow for the company of £120.

3. However, the company is only obliged to offer this facility if another customer can be found and in this case Customer B purchases the shares of Customer A for £120. The net cash effect on the company is therefore zero.

4. In month three Customer B sells his 10 shares at £15 a share to Customer C. As with month two, the company takes on £150 worth of revenue, pays out £150 of prizes and has a net gross gaming revenue of zero.

5. Let's then imagine a cataclysmic event whereby Neymar retires from football in month 4 and the share price drops to 0. At that point the Customer's shares are worthless and he suffers a loss of £150.

The net effect of this worked example demonstrates that BetIndex is able to effectively turn a bet into a tradable security but only when a new buyer is found for selling shares. Therefore, the company's liability is restricted and its revenues are the commissions earned on selling shares and the value of the initial shares created.

22. The ability for customers to trade the bets was by this time a key feature of the Football Index product.

23. As set out in Appendix 2, the Review has received submissions from Leigh Day, who act for a number of BetIndex's former customers. In outline Leigh Day allege that the Commission should never have licensed BetIndex because (1) Football Index was "by its nature financially unsustainable and therefore destined eventually to collapse", and (2) Football Index's terms and conditions together with the game rules were "plainly unfair".⁹² The extent to which the Commission considered the viability of the BetIndex business model and the fairness of its terms and conditions is addressed in chapter 5.

C. Events leading to the suspension of BetIndex's licence and administration

24. As also set out in Chapter 5, between 2015 and 2019 BetIndex's GGY increased significantly as set out in the following table:

Year	GGY
2015	£90,839
2016	£483,538
2017	£2,989,471

⁹² Leigh Day letter to the Review dated 9 July 2021.

2018	£15,510,860
2019	£39,427,609

25. Whilst BetIndex was categorized by the Commission as a small operator between 2015 and 2018, it was re-categorised as a high impact operator in 2019 when its GGY exceeded £25 million for the first time.⁹³ By January 2020, BetIndex onboarded 20,000 new customers in a single calendar month.
26. On 13 March 2020 all Premier League, English Football League, Women’s Super League and Football Association of Wales football matches were suspended as a result of the Covid-19 pandemic (the last match having taken place on 9 March 2020).⁹⁴ Although the suspension was initially stated to be until 4 April, it was subsequently extended and Premier League matches did not ultimately resume until 17 June.⁹⁵ Unlike many of the gambling operators licensed by the Commission, BetIndex’s product was entirely dependent on football.
27. On 18 March 2020 the ‘instant sell’ function allowing Football Index customers to sell their Shares to BetIndex was suspended. According to material supplied to the Review by Leigh Day, FAQs on the Football Index website stated:

Why have the spreads been widened so much?

This is in order to protect Portfolios and stabilise the market until the picture becomes clearer on when football will resume. A wide spread acts as a deterrent to panic selling. The displayed sell price is only a quote on Instant Sell. As usual you are likely to achieve a significantly better price from the sell queue.

How are you legally able to set such big spreads?

The Instant Sell function is sometimes suspended in normal trading conditions. The Instant Sell price offered can also vary from time to time depending on market conditions. As per our Game Rules, we reserve the right to suspend Instant Sell, temporarily or otherwise, and/or vary the Instant Sell price for a specific footballer or all footballers.

⁹³ GC response to written questions from the Review.

⁹⁴ <https://www.theguardian.com/football/live/2020/mar/13/premier-league-and-british-football-set-for-shutdown-due-to-coronavirus-live>

⁹⁵ <https://news.sky.com/story/coronavirus-premier-league-to-return-on-17-june-after-three-month-lay-off-11996309>

Why is Instant Sell not always available?

As mentioned above, Instant Sell is sometimes suspended during normal trading conditions. In the current unprecedented situation, we have suspended this function more frequently in the interests of customer Portfolios. Markets are from time to time suspended in extraordinary circumstances – such as what we’re experiencing currently. In fact, the Philippines have suspended all their financial markets as of today (17/03) until further notice. The purpose of suspending Instant Sell for periods is to protect the long-term integrity of the market from extraordinary and extreme volatility which doesn’t reflect the underlying value of a long term 3 year bet.

28. In response to queries raised by the Commission’s Compliance team, BetIndex stated that it had instructed a firm of solicitors to review its terms and conditions for compliance with the Consumer Rights Act 2015 and the Consumer Protection from Unfair Trading Regulations 2008. The new Football Index terms of use were published on 7 April 2020. One of the principle changes was to clause 4.3, which dealt with the advance notification which BetIndex had to provide to its customers of any changes to its Service and/or Terms of Service.
29. On 9 July 2020, shortly after football fixtures resumed following the lockdown as a result of the Covid-19 pandemic,⁹⁶ BetIndex increased the amount of Dividends to be paid out by around 30%.
30. On 26 August 2020, following feedback from its customers BetIndex increased Dividends by around 100% compared to the previous season, with effect from 12 September 2020.
31. According to information provided to the Review by Leigh Day, on 10 September 2020 BetIndex appears to have amended the Football Index terms of use, making further changes to the clauses relating to BetIndex’s right to change the Service and amend the terms of Service.
32. The increase in Dividends appears not to have stabilised trading on Football Index. In response to a period of abnormal trading of Shares in players on 13 September Football Index posted the following announcement:

Dear Traders,

⁹⁶ The Premiere League resumed matches on 17 June 2020.

While we usually refrain from providing market commentary, we feel it is important to recognise the market experienced abnormal trading patterns late last night and through to early this morning. Our risk team has been monitoring the situation very closely.

The market is now stable. In the unlikely event that there is further high level of volatility, we won't hesitate to temporarily suspend the market if necessary. We understand the concern this has caused. We are determining the factors that have contributed to this volatility and will communicate our findings once this has been completed.

A one-off correction as a result of freeing Offers from the restraint of the Sell Queue is not entirely unexpected, but we are still assessing exactly what took place.

We would urge Traders to take care in case of over adjusting trading strategies, and to remember that the intrinsic value of the 3 year bet driven by the 20/21 Dividend Chart remains unchanged – exactly the same as it was 48 hours ago.”

33. At some point in September 2020 BetIndex issued what it described as a product enhancement announcement which stated that *“with the unprecedented loss of Football and with widespread selling panic we saw at the onset of the Covid 19 lockdown, the House had to take the decision to suspend Instant Sell liquidity (as allowed for in our game rules) due to a high degree of volatility relating to the emerging situation. That volatility encouraged some ‘panic’ cashing out of bets, and the reduction and suspension of Instant Sell was effective in stabilising prices in the Football Index market.”* The announcement went on to detail BetIndex’s introduction of a ‘Bid Engine’ feature in order to create a *“‘secondary market’ style opportunity”* for users.
34. As the instant sell function had not been reinstated, BetIndex wished to provide an alternative for customers wishing to cash-out and re-bet Shares more quickly than by using the sell queue option (that is, waiting to be matched to other customers who wished to buy their Shares). The Bid Engine would, essentially, *“allow those Users wishing to purchase Shares below the Market Buy price by lodging their Buy Intentions at a price of their choosing up to a maximum discount of the ‘Spread’ (which is currently 40% but will very likely reduce to much less as the market gets flowing again).”* Those users entering the highest bids would purchase the Shares at the price bid.
35. On 1 October 2020 BetIndex made a market announcement in which it stated: *“...we have engaged with financial regulators with the objective of holding a licence that is more appropriate for our ‘market’ than our current ‘betting’ licence.”* In the same announcement it detailed the difference

between the old and new pricing models, stating that “*Order Books means we have handed the reins to Traders to determine the price, although currently with some restraints – mainly the floor on the Offer Zone and the VWAP of 900 Shares on the Offer side.*” After referring to “*current Trader sentiment*” and it being “*a difficult time*” as a result of Covid-19, the economy and Brexit, the announcement continued: “*we have now been operating for 5 years and we’ve never been in a stronger financial position than today.*”

36. The Football Index website indicates that under the changes customers could place Buy Orders and Sell Orders on footballers. There were two types of Buy Orders: (1) Buy Now, which allowed Shares to be bought instantly at the market buy price, and (2) Bid, which allowed customers to set the price at which they wanted to buy Shares. There were also two types of Sell Orders: (1) Instant Sell, which allowed customers to sell Shares instantly (the Review understands that this was to other customers) at the market sell price (a function which the Review understands to be different to the earlier ‘instant sell’ function, whereby customers could sell their Shares back to BetIndex), and (2) Offer, which allowed customers to set the price at which they wanted to sell Shares. Customers could place up to three Offers per footballer on the platform at any one time, with a maximum of 300 Shares per Offer.⁹⁷
37. In its announcement BetIndex explained why it had made changes to the Order Books facility as follows:

Some Traders have asked why we have changed from the old model in which we substantially controlled prices. There are three reasons, firstly from a regulatory standpoint, it has been made clear to us that it’s not our place to determine the prices at which Shares are Traded in the market. This must be determined by our Traders.

Secondly, as we’ve grown, we’ve been subject to more sophisticated accounting policies which effectively drive us to the same conclusion.

Lastly, and most importantly, for us to reach our growth potential, which is still huge just in the UK, we need to embrace a trading style in-step with global markets that trade trillions every day – whether that’s equities, derivatives, FX or crypto. We need to adopt the same conventions as those markets – Order Books which enable the market to establish price are an essential pre-requisite.

⁹⁷ <https://trade.footballindex.co.uk/orderbooks/>

38. BetIndex introduced new Football Index terms of use on 28 January 2021 with an introductory section in bold which included a range of warnings about the risks involved in using the Football Index platform:

It is very important that you read and understand our Terms of Use and Game Rules before placing a Bet. If you do not understand or agree with them, please do not place a Bet or otherwise use the Service.

KEY RISKS:

- *Your money is at risk when you place a Bet on Football Index. You may lose your Stake. There is no guarantee of winning any particular amount of Dividends in respect of Bets. Share prices may fall or rise.*
- *The Dividend Table will change from time to time. This will usually only occur during prescribed periods and will apply to open Bets as well as new Bets. The structure and level of Dividend set by us is primarily influenced by the volume of Shares being traded on the platform. If the volume of trading increases, it is more likely (but not certain) that the level of Dividend offered may be maintained or increase. However, if the volume of trading decreases, it is more likely (but not certain) that the level of Dividend offered may decrease. Please see clause 4 for more information. Any change in the Dividend is likely to impact Share prices.*
- *There are two categories of Dividends: Core Dividends and Promotional Dividends. We will only remove the Core Dividends in certain limited situations. Please see clause 4 for more information.*
- *The basis on which Dividends are awarded may change (e.g. the overall structure of or categories in our Dividend offering, adjustments to the match day scoring matrix, or footballer positional changes).*
- *You may not be able to cash-out your Bets at any particular time. Your ability to cash-out open Bets is influenced by the level of demand for Shares among other users on the platform. We do not buy back Shares.*
- *We may increase Commission or the basis on which it is paid from time to time. Please see clause 4 for more information.*
- *If your Account is terminated other than for your Material Breach (or in certain self-exclusion scenarios) and you still have open Bets, we shall try to cash-out of open Bets on your behalf by listing them at the then current buy price for up to 12 months (at which point we will review your Account) but, if we are unable to sell your Bets (e.g. because there are no Bids to match against within that timeframe) you may lose some or all of the value of your Shares (including your underlying Stake).*
- *We may add, remove or change product features and/or functionality. This may impact how or when you can place, or cash-out of, Bets and/or otherwise use the platform.*

- *Where we make any material changes that are to your detriment, we will give you at least 30 days' advance notice by alerting you on the home page of this site and the app and/or by email.*
- *We may need to contact you from time to time in accordance with these terms. You should ensure that you keep your contact details up to date and add news@email.footballindex.co.uk to your safe sender list.*

39. On 5 March 2021 BetIndex gave its customers and the Commission 30 days' notice of a cut in the amount of Dividends to be paid out – the change was thus due to come into effect on 4 April 2021. The notification to the Commission stated: *“We are continuing to experience challenging trading conditions, highlighted in our quarterly return for Q4 2020. A business recovery plan has been agreed by the Board as offering reasonable success in our ability to “trade out” of this period...A key part of this recovery plan is the reduction of Dividends payments...”*
40. Shortly after the notice of the cut in Dividends, on 8 March 2021 BetIndex advised the Commission of a plan to self-suspend with a view to restructuring and relaunching. The company's senior management met with the Commission at 3pm and explained that:
- a. The company was operating in extremely challenging trading conditions.
 - b. A decision had been made in August 2020 to increase the Dividends paid out (which had been £1 million per month) in order to increase the trading volume on the platform, a change which came into effect in September 2020 and was announced to be in place until May 2021 for the football season. Users had been unhappy with an initial increase of 30%, so the company had altered the increase to 100%, at a cost of £2 million per calendar month.
 - c. However, it became clear that the increase in Dividend payments had not brought in additional business. This was due to both a lack of new customers and reduced activity from those on the platform. BetIndex had ceased advertising during the lockdown, which was the initial cause of the difficulty in acquiring new customers, but the onboarding of new customers had never regained its pre-pandemic rate. In January 2020 the company had onboarded 20,000 new customers in a single calendar month, but the figures had been a tenth of that since the crisis began. Steps to manage the capital available to the company by cutting costs and directors' salaries, reducing the workforce, advertising clawback and negotiating relief in

relation to office space had been insufficient. The company was therefore in the unsustainable position of paying out higher Dividends without additional money coming into the platform, and looked likely to proceed with some form of voluntary arrangement.

- d. BetIndex had taken the decision at the end of the previous week to reduce Dividends in line with its terms of service. When the Dividend reduction was implemented the amount paid would be £550,000 per month, a drop of 45% from the levels paid in August.
- e. All funds went into a player protected account protected by a trust. BetIndex currently owed customers £3.8 million, but there was £6 million in the account. Open bet stakes (based on the price paid for the Shares by the customer) were £128 million – those Shares were currently worth around £20 million (at the total Share valuation sell price displayed on the BetIndex website, based on the amount customers were willing to pay for a Share at that time).

41. On 9 March 2021 a Commission employee summarised his views for BetIndex’s financial difficulties as including the following:

- a. As a result of the suspension of football matches during the lockdown in March to June 2020, and BetIndex’s subsequent voluntary commitments to cease advertising in line with its membership of the Betting & Gaming Council (“**BGC**”),⁹⁸ monthly on-boarding of new customers decreased to 10% of BetIndex’s pre-lockdown levels.
- b. BetIndex’s increase in monthly Dividends paid out failed to bring in sufficient new income to compensate for the increase in Dividend payments.
- c. Other steps, such as reducing the workforce by 40%, slashing the budget for marketing and advertising and clawback of pre-purchased advertising, reductions in salaries and office costs, also failed to have sufficient impact.

⁹⁸ The standards body for the regulated UK betting and gaming industry, excluding the National Lottery. <https://bettingandgamingcouncil.com/>

- d. As a result, on 5 March 2021 BetIndex gave its customers 30 days' notice of a cut in Dividends to be paid out. The planned changes would see Dividends drop to £550k per month from April – a reduction of 45% on the level of Dividends paid in August 2020.
42. BetIndex's announcement prompted a strong reaction from its customers, who saw a sudden marked drop in the value of the Shares which they held. The company's Jersey solicitors later stated that death threats had been received by the company's employees, leaving them fearing for their safety and that of their families. Employees of the connected businesses resigned and the damage done by virtue of an online campaign made the company's board reconsider whether the venture remained in any way viable in its current form.
43. At 11:16am on 11 March 2021 BetIndex sent an email to the Commission attaching a letter addressed to the Jersey Gambling Commission indicating that BetIndex would be entering into administration.
44. Later that day, BetIndex's Chief Compliance Officer confirmed in a telephone call with the Commission that BetIndex intended to self-suspend on that date. However, the company would be unable to allow customers to withdraw customer funds, as a clause in the Deed of Trust for customer funds defined customer funds as including "*...any crystallised but as yet unpaid loyalty or other bonuses in respect of any customer, in each case, irrespective of whether the Company and the customer are party to any Bet.*" That definition would include the Dividends continuing to accrue to players on a daily basis. BetIndex indicated that it did not have sufficient funds to cover customer funds as described in the Deed of Trust.
45. As a result, the Commission suspended BetIndex's gambling licence with immediate effect at 22:05 in the evening of 11 March 2021.
46. An administration order was granted by the Royal Court of Jersey on 18 March 2021 and a letter of request issued to the High Court of England & Wales. The High Court made an administration order pursuant to the letter of request on 26 March 2021. As a result, the date until which accrued Dividends had to be paid to BetIndex customers was 26 March 2021.

BetIndex Report Chapter 5 - The Actions of the Gambling Commission

1. This chapter contains the Review's account of the relevant actions of the Gambling Commission. It deals with:
 - A. The granting of an operating licence to BetIndex.
 - B. The Commission's Monitoring and Compliance activities in relation to BetIndex;
 - C. The Commission's review of BetIndex's operating licence in light of concerns that BetIndex was in breach of licence conditions or was non-compliant with Social Responsibility Code Provisions.
 - D. The Commission's decision to suspend BetIndex's operating licence on 11 March 2021.
 - E. The Commission's response to complaints about BetIndex or actions taken in respect of BetIndex by other parties.
 - F. Conclusions in relation to the actions of the Gambling Commission
2. This chapter gives an account of the actions that were taken by the Commission based on the sources discussed in chapter 9. Questions of what else the Commission could or should have done or whether the Commission should have taken different steps are considered in chapter 8 of the Report which considers areas for improvement and recommendations.
3. Several sections of this chapter set out the actions taken by the Commission that involved the FCA. An account of the FCA's relevant actions appears in the following chapter, chapter 6, and there is inevitably some overlap in the accounts, albeit from different perspectives.

A. Licensing of BetIndex Ltd

4. In order to operate as a remote gambling business in Great Britain BetIndex⁹⁹ required a

⁹⁹ Company registration number 119040.

licence. BetIndex trading as Football Index was issued with a Remote Operating Licence Number 000-043061-R-322161-001 by the Commission on 9 September 2015 (“**the Licence**”), authorising BetIndex to provide facilities for real event betting other than pool betting or betting on virtual events subject to specific and general conditions imposed by the Commission and statutory conditions attached by the Gambling Act 2005. The relevant regulatory framework within which the Commission operates and awards licences is set out in chapter 3 of the Report.

(1) Background to the BetIndex application

5. Before BetIndex’s 2015 licence application, BetIndex’s parent company Fame Ventures Ltd¹⁰⁰ (“**Fame Ventures**”) applied for a licence for a product with some characteristics which were similar to BetIndex’s product. Fame Ventures was incorporated in England and Wales on 6 November 2012:
 - a. In September 2014 Fame Ventures made an application for a Remote General Betting Standard – Virtual Event Category F Operating Licence in relation to a game previously called ‘Fame500’ but (by the time of the application) rebranded as ‘FameIndex’. The FameIndex product was not based on football. It allowed players to bet by buying units in listed celebrities called ‘Pledges’ which represented a wager that the celebrity would reach the top of what was referred to as the ‘Buzz Chart’, thus entitling the player to a fixed payout per pledge. The ‘Buzz’ score for each celebrity was to be based on a trending metric measuring the change in volume of social chatter around a celebrity.
 - b. Fame Ventures stated in correspondence with the Commission that they were looking at possible options that might allow players to trade or swap bets in the future, but were focussing on refining the core gambling proposition. The Commission confirmed that any decision to allow players to trade or swap bets would have to be notified to the Commission prior to launch and full details provided, as that might require a further licence.

¹⁰⁰ Company registration number 08283149. The parent company’s name was subsequently changed to Index Labs Limited on 4 December 2019.

- c. Fame Ventures subsequently confirmed to the Commission on 6 November 2014 that, in the event of a future development of the game allowing players to trade or swap bets, Fame Ventures would notify the Commission prior to launch with full details. The Commission refused the application in around December 2014 due to a lack of information and failure to provide amended documentation.
 - d. On 8 January 2015 Fame Ventures made a further application for a General betting (standard) (real events) licence and a Gaming machine technical software licence in relation to a game now called Football Index. The Game Play Rules provided for players to buy units known as “Futures” in football stars known as “Names” listed on a website. The holders of “Futures” in the “Name” with the highest daily score on “FootballBuzz”, a monitor of all UK online football news, would win a fixed payout known as a “Dividend”. It is notable that the description of the features of this proposed product used language generally associated with the financial markets, such a “Dividend” and “futures”.
 - e. The application stated that the business was funded from the personal wealth of individuals associated with BetIndex. £1 million had been raised as the result of the sale of a house and evidence to demonstrate the existence of the funds was provided.¹⁰¹
 - f. The Review understands that the Gambling Commission granted both licences on 27 March 2015.
 - g. Subsequently, on 17 April 2015 Fame Ventures’ solicitors notified the Commission, as an imminent Key Event, of both a change of corporate control and of two proposed changes to the game rules: to allow for promotion and relegation of footballers from a ‘1st Team’ list and to allow players the option to ‘cash out early’ (as described in chapter 4 of this Report).
6. The Commission has told the Review that licensees are required to submit information about Key Events via the Commission’s electronic portal (eServices) within 5 days of the event occurring. Key Events can also be received directly via email, and Commission

¹⁰¹ GC Response to written questions from the Review.

employees in the contact centre can create Key Events if they receive a complaint identifying a serious concern about a licensee's conduct. The Commission's Licensing team receives automatic notification of any Key Events submitted and uses a triage system to review the information provided in order to decide where the Key Event should be referred for further review and action as appropriate. This could be to the Compliance team or to an internal expert such as a forensic accountant or specialist.

7. The Commission may follow up a Key Event notification with enquiries to the licensee, or possibly by a decision to conduct an assessment. Where a Key Event is followed up, an IRF will often be created in parallel and the matter will be referred to the Commission's IMG for decision and oversight. The process is audited by a two-weekly circulation of recently notified Key Events to managers across the Commission, who then check that Key Events have been actioned. The Commission told the Review that between 1 April 2020 and 31 March 2021 it received 12,563 Key Events, of which 441 were referred on and actioned by the Compliance team.¹⁰²
8. Following an unsuccessful application for the business to operate under an umbrella licence, Fame Ventures took the decision to incorporate BetIndex as a Jersey company and issue an application for a new remote operator's licence in that entity's name. BetIndex was incorporated in Jersey on 17 July 2015, and the application was made on its behalf by SMP Partners Limited on the same date. As well as the application form, BetIndex submitted a number of documents including a business plan, financial projections, AML manual, complaints procedure, data protection policy, game rules, terms and conditions and remote gambling policies relating to the UK LCCP. As set out in chapter 4, the version of the Game Rules submitted as part of the BetIndex application was virtually identical to the one submitted with the Fame Ventures application.
9. As part of the application, SMP Partners signed a declaration which stated: *"Should the information provided in relation to this application cease to be correct, or if there are any changes in the information provided between the date the application was submitted and the date it is determined, it is the Applicant's responsibility to advise the Gambling Commission immediately. Failure to do so could result in any licence subsequently issued being reviewed and possibly revoked...I agree to notify the Gambling Commission should any of the information given in this application change."*

¹⁰² GC Response to written questions from the Review.

(2) Assessment by the Commission of the BetIndex application

10. At the time of BetIndex's application for a gambling licence in 2015, the Commission's review of the application was based on the general principles set out in section 70 of the Gambling Act 2005 (as summarised in chapter 3). Accordingly, in considering the application the Commission had to have regard to (among other things) the licensing objectives, and had to form and have regard to an opinion of BetIndex's suitability to carry on the licensed activities.¹⁰³ In forming and having regard to such an opinion, the Commission might, in particular, have regard to (among other things) the financial and other circumstances of BetIndex or of a person relevant to the application (and, in particular, the resources likely to be available for the purpose of carrying on the licensed activities).¹⁰⁴ Any operating licence issued would be subject to the condition that BetIndex ensured compliance with any relevant social responsibility provision of a code of practice issued by the Gambling Commission.¹⁰⁵

11. Since June 2017 licensing applications have been assessed by the Commission's Licensing Division in accordance with its regulatory risk model as set out in section 2 of its policy statement 'Licensing, compliance and enforcement under the Gambling Act 2005',¹⁰⁶ which is used by the Commission to assess the risk posed by applicants to the 3 licensing objectives under the Gambling Act.

12. The Commission now makes an initial identification of the relevant risk(s) presented,¹⁰⁷ before considering the likelihood of a risk or risks occurring and the likely impact.¹⁰⁸ The Commission identifies risk categories and the information necessary to assess likelihood of risk (such as how compliant the operator is, or is likely to be, with the requirements of the Gambling Act and the LCCP, together with organisational matters such as accountability and governance, competence and integrity of staff, and the effectiveness of policies and procedures designed to minimise the risk to the licensing objectives).¹⁰⁹

¹⁰³ Section 70(1)(a) and 70(1)(b) of the Gambling Act 2005.

¹⁰⁴ Section 70 of the Gambling Act 2005.

¹⁰⁵ Section 82 of the Gambling Act 2005.

¹⁰⁶ GC Response to written questions from the Review.

¹⁰⁷ Paragraph 2.8.

¹⁰⁸ Paragraph 2.10.

¹⁰⁹ Paragraph 2.11.

13. A significant part of the assessment relates to the applicant's suitability to hold a licence, a process which continues after a licence has been granted by means of the Commission's compliance processes.¹¹⁰ The Commission assesses the likely impact of a risk based primarily on the size and market scope of an operator (actual or potential) and their previous regulatory history. The assessment may include size of customer base, number of premises, turnover or gaming yield, and extent of the licensed activity.¹¹¹ As to addressing the risk, the Commission's policy statement provides:

2.14 The impact and likelihood of a given risk (or risks) is then taken into account as part of an overall risk assessment. This will determine the degree and type of regulatory engagement that may be required, although impact will be the primary consideration in this determination. The Commission considers that some operators will always be higher impact because of the size and scale, or nature of their operations. Those who have extensive operations (in terms of impact) or a significant market share will always receive a greater degree of regulatory oversight due to the market impact (actual or potential) should regulatory risk materialise or be identified. This is why additional information may be required at the licensing application stage and also why the Commission has adopted a relationship management approach (through identified staff) for certain high impact operators.

14. Once any regulatory action is completed, the risk is re-assessed to determine whether the desired outcome has been met in addressing the risk(s) or further attention is needed.¹¹²
15. In July 2105 Commission employees assessing licensing applications used a document entitled 'Remote Assessment Guidance for remote operators (not land based)', which provided prompts through a series of 42 questions, including Question 3 "*How is the business funded and does the business have the financial ability to support the delivery of the proposed licensed activities?*", Question 4 "*Are there suitable financial resources to cover gambling facilities?*", Question 35 "*How will the operator evidence that their rules are fair and open?*" and Question 42 "*Do the Gambling Commission licences applied for match all gambling facilities to be offered?*"
16. As to Question 3 ("*How is the business funded and does the business have the financial ability to support the delivery of the proposed licensing activities?*"), the guidance stated: "*This question relates to the financial stability of the business (SUITABILITY). It is asked to make sure there is no adverse*

¹¹⁰ Paragraph 2.12.

¹¹¹ Paragraph 2.13.

¹¹² Paragraph 2.18.

impact on the three licensing objectives i.e. to keep crime out of gambling, to ensure that gambling is conducted fairly and openly and to protect children and other vulnerable people from being harmed or exploited by gambling. Objective: This question is designed to assess whether there are any apparent financial issues that may lead to an adverse impact on any of the three licensing objectives, for example, financial pressures that may compromise a sufficient level of supervision of the gambling facilities (protecting children and the vulnerable) or the paying out on a large bet (fair and open). A proportionate approach should be considered when assessing this question. The Commission is not concerned with assessing the overall viability of any gambling business.”

17. BetIndex was required to submit bank statements for the past 6 months for all bank accounts which it held, proof of funding for initial set up and ongoing trading, and profit & loss and balance sheet projections for the next 3 years. Applicants for licences also had to submit financial statements on behalf of any parent company.¹¹³ As BetIndex’s business model would involve holding remotely customer funds for use in future gambling, it was required under the LCCP to hold them in a separate client bank account or accounts. Part of the Commission’s assessment prior to granting the licence involved ensuring that there was a statement on BetIndex’s website or in information made available to customers whether or not customer funds were protected in the event of BetIndex’s insolvency, and if so the method by which it was achieved. The Commission also checked that there was a provision to that effect in BetIndex’s terms and conditions by reviewing the Football Index website. The prompts for the assessor stated: *“There should be a protection of player funds statement on the website and within their terms and conditions. It should indicate and make clear whether customer funds are protected/ not protected in the event of insolvency. Make sure the statement is in line with Commission policy and compliant with the LCCP. The statement should state the method by which this is achieved. For further guidance on requirements for LCCP, please refer to LCCP code provision 4.”*

18. The Assessment Guidance provided in relation to Question 35 (*“How will the operator evidence that their rules are fair and open?”*) that *“Evidence is provided that shows how the requirement is met that any changes to their rules and terms and conditions are notified to customers prior to being applied. Terms and conditions need to be easily accessible and include a privacy statement. There is clear evidence that rules and conditions of the gambling facilities are available and understood and that the terms offered are fair to all.”* Specific prompts to the assessor were: *“Can players easily locate and access terms and conditions. The terms and conditions should include a privacy statement. Are any of the terms and*

¹¹³ GC Response to written questions from the Review.

conditions deemed to be unfair. Players should be notified in advance of changes to terms and conditions. Are there any fees or terms or conditions that might affect a customer ability to withdraw their funds.”

19. Under Question 42 (“Do the Gambling Commission licences applied for match all gambling facilities to be offered?”), the guidance stated: “This question can never be ‘not applicable’. Check regulatory returns and the business plan – does the regulatory returns [sic] match what they indicated in their business plan – are they offering games/ activities that they may not be licensed for. The operating licence(s) applied for are correct for the gambling facilities to be offered.”
20. The Commission has told the Review that for the purpose of assessing licence applications its Licensing team now use a document called ‘Operational Guidance Note Licensing Application Assessments’ (the latest version of which is dated May 2021) and an associated tool.¹¹⁴
21. The forecast provided with the application by BetIndex made reference to a shareholder loan from its parent company Fame Ventures. A formal loan agreement had not been signed but a draft copy was provided, which evidenced that the loan was a drawdown facility for the sum of £300,000 provided by Fame Ventures which could be accessed as necessary and was subject to a low interest rate of 4%.¹¹⁵ As set out above, the Commission had already assessed Fame Venture’s finances in the course of its own previous licence application.
22. As set out in chapter 3, for the financial year 2015/16 the Commission received 273 new operating applications, of which 93 included betting activities.¹¹⁶ BetIndex was assessed as a small operator with a likely annual GGY of less than £5,500,000.¹¹⁷
23. The Gambling Commission told the Review that its approach to operator assessment is risk-based. Around 95% of all GGY is generated by the largest 40 operators, and so by focussing its resource on this group it achieves significant coverage of the industry. Between 2018 and 2019 the GGY for the largest 20 operators ranged between

¹¹⁴ GC Response to written questions from the Review.

¹¹⁵ GC Response to written questions from the Review.

¹¹⁶ GC Response to written questions from the Review.

¹¹⁷ GC Response to written questions from the Review.

£2,018,666,650 and £107,973,511.¹¹⁸ In its first two years of trading (2015 and 2016) the GGY for BetIndex was £90,839 and £483,538 respectively. At the start of its operations BetIndex was, therefore, a very small operator in comparison with others regulated by the Commission.

24. The Commission told the Review that *“Each application, regardless if successive and/or made by the same or related entity, is considered anew and individually on merit and on the evidence available.”*¹¹⁹ However, in an email dated 2 July 2015 to Fame Ventures’ solicitors in relation to the speed with which the proposed BetIndex application could be determined, a member of the Commission’s Licensing Division stated that some of the supporting documentation and evidence *“won’t be required because their parent company is already known to us.”* Further, in an internal email in 2019 the member of the Commission’s Licensing Division who had dealt with the BetIndex application stated that *“The operational model for BetIndex had already been approved under the Fame Ventures application and therefore was not significantly re-examined as part of the BetIndex application.”* The Commission have told the Review that this would have referred to the fact that matters such as financial information relating to Fame Ventures would not have had to be reconsidered as part of the BetIndex application.
25. None of the documents submitted by BetIndex in relation to its licence application made reference to the product having a ‘cash out’ function such as the one Fame Ventures had mentioned in its letter dated 17 April 2015 referred to at paragraph 5.g above, including the Game Play Rules. Despite this, a ‘cash out’ (or ‘go-to-market’) facility does appear to have featured on the BetIndex’s pre-licensing website which was reviewed twice by the Commission’s Licensing Division in August 2015. This discrepancy between the terms of the licence sought and the functions of product being offered was not identified by the Commission’s Licensing Division at the time, despite the prompts under Question 42 of the Remote Assessment Guidance.
26. In respect of the discrepancy between the terms of the licence sought and the features of the product that were in fact to be offered to the public, BetIndex subsequently stated that, in applying for the BetIndex licence, SMP Partners had relied heavily upon the business plan used for the successful Fame Ventures application (which did not mention a ‘cash

¹¹⁸ GC Response to written questions from the Review.

¹¹⁹ GC Response to written questions from the Review.

out' facility) and had not taken into account the subsequent Key Event notification in April 2015.

27. In any event, at the time that BetIndex's licence was issued on 9 September 2015, the Commission had not considered or approved the 'go-to-market' function, even though it formed part of BetIndex's product from the time it was first launched in October 2015.
28. It seems likely that the review of BetIndex's application would have included a consideration of whether BetIndex's terms and conditions were fair and open in accordance with question 35 of the Assessment Guidance. We have not, however, been provided with material that suggests that at this stage the Commission gave specific consideration to whether the use of the language of the financial markets in relation to the Football Index product gave rise to a risk that the product would not achieve the licensing objective of fair and open gambling. The potential for consumers, who would be unlikely to consider the detail of the terms and conditions, to be confused by the language and presentation of the product and consider that they may have been purchasing an investment product does not appear to have been addressed at this stage.
29. At this stage, as the 'cash out' (or 'go-to-market') function was not included in the rules and had not been identified by the Commission in its scrutiny of the website, it seems unsurprising that the Commission did not consider that there were any issues with the financial viability of the product. As the Commission then understood it, BetIndex's liabilities were limited to paying out daily media Dividends to customers, and BetIndex had a contractual ability to control the extent of its Dividend liabilities by varying the level of Dividends paid .

B. Monitoring and Compliance Activities

30. After the grant of a licence to BetIndex by the Commission's Licensing team, the Commission's ongoing engagement with BetIndex was through its monitoring and compliance activities. The Commission's Compliance Division's range of responsibilities included the monitoring of BetIndex's regulatory returns, considering its information security audits and assessing Key Event and other information provided by BetIndex .

31. The Commission's oversight of BetIndex did not extend to proactive monitoring of matters such as changes in BetIndex's contractual provisions. The Commission has told the Review that, whilst it may consider aspects of a licensee's finances as part of any subsequent compliance activity which it undertakes, the Commission's regulatory remit does not extend to continuous real-time monitoring of the financial health of operators within an open marketplace. According to the Commission, such an approach would represent a very different form of regulation and would require a significantly different funding model to the one currently set out in the legislation. Resources would need to be substantially increased from the current levels of around 338 staff and a budget of around £18.87 million to regulate the approximately 2,800 existing gambling operators in such a way.¹²⁰

32. In 2015 the majority of Compliance resource was committed to conducting assessments of land-based operators, with a separate programme for assessing those larger operators which the Commission categorised as high-impact. A typical assessment of a remote operator at the time would consist of reviewing the operator's:

- website (to check that licensed status was correctly displayed, for safer gambling messaging and to ensure that the product matched that which was licensed);
- key policies and procedures such as those relating to safer gambling;
- staff training arrangements;
- senior management/board oversight of the business; and
- internal business structure.

33. Members of the Compliance team would also conduct telephone interviews with key members of staff to discuss their product and to test their knowledge and understanding of key elements of the LCCP. The Review has not been provided with information as to how frequently such telephone assessments would be carried out.

34. The Commission has told the Review that from 2015 it began to increase the quantity of resource focussed on the assessment of remote operators, and to deploy a variety of ways

¹²⁰ GC Response to written questions from the Review.

to raise standards in the market through guidance, industry engagement and punitive measures. For example, in 2016 the Commission introduced ‘small operator workshops’ on a regional and sector basis to share good practice and raise standards. The use of annual assurance statements was piloted with around 45 of the largest operators (those with annual GGY in excess of £25m). From 2017 the Commission developed its risk-based approach to compliance activity and increased its focus on anti-money laundering (“**AML**”) and counter terrorist financing controls, in particular on online casinos. From September 2017 the Commission introduced a new approach to the assessment of remote operators entitled ‘show me don’t tell me’, which involved the use of video conferencing technology to view licensees’ back office systems and real customer accounts.

(1) Regulatory returns

35. As a remote operator, BetIndex was required to submit quarterly regulatory returns to the Commission’s Licensing Division containing information including GGY, the amount of funds held in customer accounts and numbers of accounts in total, active accounts, active customers, complaints and disputes logged, self-exclusions.¹²¹ Each quarterly return would be reviewed by the Commission’s Licensing Division to check for potential licence breaches, which could be escalated to the Commission’s Compliance Department as necessary. BetIndex submitted 22 regulatory returns between 9 September 2015 and 3 March 2021, of which two raised the need to increase the licence fee category as GGY increased in 2018, and two indicated a significant downturn in business revenues in 2020 and 2021.¹²²

36. The regulatory returns demonstrated BetIndex’s GGY over the period of its operation as follows:

Year	GGY
2015	£90,839
2016	£483,538
2017	£2,989,471
2018	£15,510,860

¹²¹ GC Response to written questions from the Review.

¹²² GC Response to written questions from the Review.

2019	£39,427,609
2020	£25,752,316
2021	-£5,157,638

37. Between 2015 and 2018 BetIndex was categorised as a small operator. In 2019 BetIndex exceeded annual GGY of £25 million for the first time, at which point it was re-categorised by the Commission as a high impact operator, and notified that it would be required to submit an annual assurance statement. The Commission has told the Review that BetIndex was identified for a proactive full assessment, but that before the assessment could be scheduled the Commission identified areas of concern through its monitoring of Key Events data and instead targeted BetIndex for an immediate reactive assessment in May 2019.¹²³

(2) Information Security Audits

38. BetIndex was also required to submit annual information security audits for review by the Commission’s Compliance Division. The Compliance Division would evaluate each audit using a template report in order to check that the auditor was independent and suitably qualified, no significant concerns had been identified, that any issues identified were addressed in a management response or action plan, and that the audit covered the key areas within the International Organisation for Standardisation (“ISO”) standard.¹²⁴

39. The Commission has told the review that the purpose of the information security audit is to confirm that the operator has the necessary policies, procedures and controls in place, that these are effective and they conform to the ISO. It is not designed to inform the Commission of changes to a product, which should be notified to the Commission through the more immediate Key Event process.¹²⁵

(3) Information from third parties

40. The Commission’s Compliance team would also review information from third parties

¹²³ GC response to written questions from the Review.

¹²⁴ GC Response to written questions from the Review.

¹²⁵ GC Response to written questions from the Review.

including consumer complaints, Key Event information submitted by operators, and intelligence reports referred from the Commission's Intelligence team.¹²⁶ Third party information and complaints in relation to BetIndex are considered in paragraphs 178 to 202 below.

(4) Escalation

41. In the event of a Compliance assessment identifying issues which the team believed to require regulatory action, an Incident Referral Form (“**IRF**”) would be completed. The IRF would be escalated to the Commission's Issue Management Group (“**IMG**”), which consisted of members from across the Commission who would meet to discuss issues and make decisions as to next steps including, if necessary, escalation to the Commission's Case Management Group (“**CMG**”) for consideration of complex regulatory or enforcement action. In relation to many matters, including that of BetIndex, the Commission would create a multi-disciplinary team to work on the case.¹²⁷

(5) The Commission's interactions with BetIndex up to May 2019

42. On 18 December 2015, BetIndex's CEO contacted the Commission to advise that BetIndex was looking to change the manner in which 'Dividend' winnings on Football Index would be paid out and querying whether a variation to the licence would be required. Rather than a fixed 20p payout on each Dividend, BetIndex proposed making the Dividend a fixed percentage of its daily revenue from bets. In considering the request, the Commission noted internally that *“It's fair to say that this is a somewhat unique business model.”* BetIndex subsequently decided against making the proposed changes.
43. In either March or the third quarter of 2016 BetIndex (the materials supplied to the Review do not allow it to determine which) added an 'instant sell' function on the Football Index website, allowing BetIndex to buy back Shares from players at a price determined by BetIndex. The change was not notified to the Commission. BetIndex stated subsequently that the change had been made following a conversation in which a member of the Commission's Licensing Division had expressed concern at the length of the bet.

¹²⁶ GC Response to written questions from the Review.

¹²⁷ GC Response to written questions from the Review.

44. On 6 April 2016 BetIndex submitted a Key Event pursuant to clause 15.2.1 of the LCCP, informing the Commission of a crowd funding exercise which had been carried out by Fame Ventures and the possibility of a change of corporate control. The funding approach was not successful.¹²⁸
45. On 7 April 2016 SMP Partners on behalf of BetIndex advised the Commission that, as the average price of a Future had risen significantly over the previous 6 months, BetIndex planned to reduce the price of all Futures, multiply the number of Futures held by players and reduce the Dividend payable, all by a factor of five. The net result would be that the value of each player's holdings would remain the same, as would the potential Dividend winnings. A Member of the Commission's Licensing Division responded on 27 April 2016 advising that since this appeared to be a change to the betting rules and terms and conditions, it would have to be clearly communicated to customers in advance of the changes coming into effect pursuant to clause 7.1.1A of the LCCP. That change appears to have been implemented subsequently, as a later business plan dated December 2018 made reference to players being able to buy up to 100 Futures in a single transaction (as described in chapter 4).
46. In May 2016 and March 2017 the Commission reviewed BetIndex's information security audits.¹²⁹
47. On 21 August 2017 BetIndex submitted a Key Event notifying the Commission that, as of 19 August 2017, it had launched a new fixed odds feature to the Football Index website known as "Performance Buzz", which analysed the performance of famous footballers across the top leagues in Europe as well as the two main European football tournaments. Customers had been notified by email and amended terms and conditions would be presented to customers upon their next login to the website. The effect of the change was to extend the win mechanic for the payment of Dividends (i.e. the events in relation to which Dividends would be paid out) from footballers' 'media mentions' (as it had been to date) to include the footballers' performance on the pitch. BetIndex also introduced a

¹²⁸ GC Response to written questions from the Review.

¹²⁹ GC Response to written questions from the Review.

feature called ‘The Squad’, a database of a further 1600 footballers in addition to the 200 footballers in ‘The Top 200’ (as explained in chapter 4 paragraph 20.d).

48. On 4 March 2018 in response to a request for information from the Commission about BetIndex’s financial position as a result of increased GGY, BetIndex confirmed that it had grown over the previous 2 years moving from a tier F-1 through to F-3 category operator. The meaning of these operator categories is explained in chapter 3 at paragraph 9. The letter described the business in the following terms:

BetIndex sells ‘bets’ in Footballers based on their ‘future performance’ both in the media (a digital version of ‘media mentions’) and on the pitch (points scored as per fantasy football powered by Opta). Holders of the bets are rewarded with ‘micro-wins’ daily known as ‘dividends’.

User’s [sic] have the opportunity to ‘sell their bet’ which is effectively a ‘cash out early’ as each bet is valid for a total of 3 years or until the player retires, whichever shall be the shorter.

49. The Commission later considered that the letter of 4 March 2018 was the first record it had of BetIndex advising that an element of the product would change. The Review has not seen any material suggesting that at the time the Commission recognised that significant changes had been made to the Football Index product since it was licensed.
50. In May 2018 BetIndex launched a feature called ‘The Academy’ offering tutorials for users of the platform.
51. On 31 July 2018 the Commission’s Compliance Division reviewed BetIndex’s Information Security Report dated 9 March 2018. The Information Security Report provided on behalf of BetIndex and reviewed by the Commission noted at p10 that “...there had been major changes since the last audit [dated February 2017 and reviewed by the Commission on 10 March 2017]¹³⁰ including an addition of 1000 plus players and changes to the game rules. The business has started IPO allowing buying of players which has expanded to include a lot of new players and they can buy shares in them. There is no longer a promotion or relegation rule applied. The business has also updated its terms and conditions and gaming rules in line with changes to prizes. Software has also been updated as part of the changes required. CR demonstrated a more complex gaming offer which was detailed in a table “football index” which includes media days, single match days and covers Premiere [sic] League

¹³⁰ GC Response to written questions from the Review.

and the major European Leagues....Customers are allowed to buy 100 “futures” at a time. The payout varies depending on match day and ranges from 2p to 12p...” Notwithstanding that the Commission has told the Review that the purpose of information security audits was not to inform the Commission of changes in the product, the Review notes that the Commission’s Compliance team did not pick up on this clear statement in the Information Security Report that the Football Index product had changed markedly from the one which had been licensed in 2015.

52. On 22 January 2019 BetIndex applied for an operating licence to allow a new entity called BetExchange to act as an intermediary in operating the Football Index platform. The application contained a business plan on behalf of BetExchange which described the business model and its development to date. This was another occasion on which the Commission was given an account of the changes in the Football Index product. BetIndex’s application for an intermediary licence was rejected by the Commission on 4 February 2019 because not all the required information and documentation had been provided, and the application fee had not been paid. The application was resubmitted in the name of BetExchange three weeks later and rejected again because it had been submitted under the wrong name. Ultimately the application was not progressed.
53. On 24 January 2019 BetIndex logged as a Key Event with the Commission that it had identified 4218 users on the platform whose age had not been verified, and had suspended all the relevant accounts. Subsequently, on 1 March 2019 BetIndex logged as a Key Event that it had identified 5 active accounts belonging to players who were underage. The accounts had been closed and the customers refunded. The Commission’s Compliance Division investigated and concluded that BetIndex had followed its age verification process.¹³¹
54. On 28 February 2019 the Commission’s Sports Betting Intelligence Unit (“**SBIU**”) was contacted by the French regulatory authority for online games (Autorité de régulation des jeux en ligne or “**ARJEL**”) asking what BetIndex’s business model was. The SBIU replied that *“Although they have a unique appearance of a trading platform (they call their bets ‘shares’), they are in fact classed as a sportsbook offering fixed-odds betting. The bets are valid for a three-year period after which point they expire. You can ‘sell’ the bet (effectively like cashing out an in-play bet) before the*

¹³¹ GC Response to written questions from the Review.

end of this three-year period for a profit or loss.” ARJEL’s response was that ‘For me, it is more FOREX than betting.’ An enquiry about BetIndex’s business model was also received from the Football Association, which was trying to understand what associated integrity risks might exist.

55. On 13 March 2019, as a result of the queries received from the Football Association and ARJEL,¹³² the Commission’s Licensing Division contacted BetIndex by email to request further information in relation to the ‘Go to Market’ option for selling Shares in the following terms:

As you are aware, BetIndex Limited currently hold a remote GBS – real event licence, which allows you to provide facilities for betting on real events.

The facilities described within the ‘Go to Market’ section appear to indicate that you may be offering something more akin to a betting exchange which relies upon a remote betting intermediary licence.

56. The Commission’s Licensing Division requested information as to how exactly the ‘Go to Market’ function worked, the advantage to the consumer, and whether BetIndex had considered (internally or with external support) the licensable status of the activity, together with BetIndex’s conclusions and rationale. This request appears to reflect a concern on the part of the Commission that BetIndex was conducting activities which were not authorised by its current licence.

57. On the same date, the Commission’s Issue Management Group (“**IMG**”) discussed the Key Event, relating to users whose age had not been verified, which BetIndex had submitted on 24 January 2019. The IMG noted that “*this system failure spans across the entire period since the website launch in October 2015*”, together with another current Incident Referral Form (“**IRF**”) relating to marketing material having been sent to a number of customers who had self-excluded themselves from gambling through GamStop (a free self-exclusion service to help users avoid online gambling). It was agreed that the Commission would conduct a targeted compliance assessment looking at AML and SR, and to identify any other issues.¹³³ This resulted in the Commission carrying out a compliance assessment of BetIndex on 9 May 2019.

¹³² GC Response to written questions from the Review.

¹³³ GC Response to written questions from the Review.

58. On 20 March 2019 BetIndex's response to the Commission's 13 March request for information was received. The information provided made clear that the 'Go to Market' option had been available to users of Football Index from the time that Fame Ventures had received its software licence in 2015. The issue was picked up by a Commission employee on 25 March 2019, who noted that *"It's obviously important that the business(es) hold the correct licenses for the activities undertaken"* and suggested referring the matter to the Commission's Legal Department. It is unclear to the Review whether an assessment of the suitability of BetIndex's licence by the Commission's Legal Department took place at this stage.

(6) The Commission's interactions with BetIndex from May 2019 until 20 May 2020

59. From May 2019 onwards the Commission's scrutiny of a number of aspects of BetIndex's activities increased. On 9 May 2019 the Commission carried out a compliance assessment of BetIndex remotely via Skype. This assessment did not deal with the question of whether BetIndex was carrying out unlicensed activities. The assessment identified the following serious AML and SR issues:

- a. Due to the extremely high level of the financial threshold at which enhanced due diligence checks were carried out, BetIndex could not provide any evidence of source of funds or source of wealth for any customers. Only basic customer due diligence verification had been obtained, in potential breach of licence condition 12.1.1(3) (Anti-money Laundering, Prevention of money laundering and terrorist financing), the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 and the Proceeds of Crime Act 2002.
- b. There was no evidence of compliance with licence condition 15.1.2 (Reporting suspicion of offences etc – betting licences), the obligations to make a report under the Proceeds of Crime Act 2002 where there is knowledge, suspicion or reasonable grounds for either, that a person is engaged in or attempting to engage in money laundering, or of consideration of suspicious transactions.
- c. BetIndex's system had no alerts set up to identify problem gambling and there was

no evidence to show that BetIndex had conducted any customer interactions with players who might be displaying signs of problem gambling, in potential breach of Social Responsibility Code provision 3.4.1 (Customer Interaction). Although there was evidence of monitoring of time and frequency of play and deposit levels, BetIndex had yet to decide what constituted unusual or problem gambling behaviour for its type of customer. Although BetIndex had invested in a new reporting tool called 'Looker' to monitor systems for problem gambling behaviour and create alerts in real time, it had yet to decide on thresholds and parameters.

60. Following the Compliance assessment, the Commission's Compliance Division completed an IRF (reference number 1617) on 16 May 2019 recommending a compliance escalation. The IRF noted that the last return submitted by BetIndex indicated that it had 1,848,646 customers, of whom 100,000 were active, and that the company was expanding rapidly, with GGY of £15,493,352 for the current period compared with £8,927,085 for the previous period. It also referred to *"discussion around which licence the operator should have, most suitable for its activities."*
61. On 17 May 2019 Commission provided BetIndex with its assessment findings, stating that it was reviewing them and considering whether to take further regulatory action. On 22 May 2019, after reviewing IRF 1617, a member of the Commission's Enforcement, Casework and Investigations team recommended that the Compliance Division obtain an action plan and conduct a follow up assessment in 3 months (rather than the 6 months originally proposed). In the event no further assessment of BetIndex was carried out by the Commission until February 2020. The Commission has told the Review that, although the Compliance team was fully aware of the recommendation, employees from its Licensing, Compliance and Legal teams, together with gambling product specialists, were further reviewing the BetIndex product. The Commission considered that the best course of action for consumers would be to seek to ascertain the FCA's views on the regulatory position, since regulation by the FCA would open up the possibility of consumers having recourse to the Financial Services Compensation Scheme ("**FSCS**"). The Commission has told the Review that throughout the period until February 2020 it continued to actively engage with BetIndex to, among other things, amend its customer messaging and website information, improve safer gambling controls and consider the protection of customer

funds. The Commission wished to make progress on resolving those issues before conducting an assessment, but kept the assessment decision under active review.¹³⁴

62. On 24 May 2019 BetIndex responded to the compliance assessment findings by submitting a letter detailing remedial actions undertaken, a customer interaction policy, an AML manual and an enhanced due diligence account file form.
63. As a result of the Commission's concerns about the extent to which BetIndex's activities were within the scope of its licence, on 29 May 2019 the Commission's legal team made contact with the FCA's Intelligence Department by telephone call and email. The Commission informed the FCA that Football Index held a betting licence granted by the Commission. The email demonstrates that by this time the Commission's legal team had been made aware of the way in which BetIndex was actually operating its licence.
64. The Commission's email to the FCA explained that the Football Index website allowed customers to buy and sell virtual 'Shares' in real life footballers, and to make money through 'Dividends' which were payments based on the performance of the footballer in the media and in matches. It noted that although BetIndex was licensed by the Commission, the company also held a licence with the Jersey Financial Services, and queried whether BetIndex should also be regulated by the FCA. The email sought to understand whether the FCA had considered this or similar arrangements before and what the FCA's position on such an arrangement was. The Commission also sought the FCA's views on whether the arrangement would be more accurately classified as spread betting under s.10 of the Gambling Act 2005, or some other regulated activity under s.22 of FSMA.
65. The Commission's Legal Department sent a further email to the FCA Intelligence Department on 6 June 2019 asking for an update, and received a response from the FCA Intelligence Department on 10 June 2019 stating that the Commission should shortly hear from the FCA's policy/legal team in response to its email. On 18 June 2019 the Commission's Legal Department sent a further email to the FCA Intelligence Department seeking a response, as no response from the FCA Policy/Legal team had been received.

¹³⁴ GC Response to written questions from the Review.

66. On 1 July 2019 in an internal email, the member of the Commission’s Licensing Division who had dealt with the BetIndex licence application in 2015 noted that the glossary of terms in business plan submitted with the application for an operating licence for BetExchange was “*very market orientated*” and the summary stated that the platform “*mimics the functionality of the stock market where demand drives prices and the share price of a footballer is a function of investor demand*” and “*The game enables users to buy and sell shares in footballers, create portfolios and win dividends.*” The Officer stated that “*Although the operator did use some “market” language in the original application, they were also very clear that it was fixed odds betting. That seems to have changed in the last four years.*”
67. On 5 July 2019 members of the Commission’s Licensing and Legal Divisions, together with another employee, took part in a telephone call with an individual from the FCA, during which an initial explanation of the Football Index product was provided. The Commission agreed to consider what information it could disclose to the FCA in order to assist the FCA’s consideration as to whether the product might constitute a regulated activity. The Commission’s General Counsel provided the information to the FCA’s Intelligence Department on 29 July 2019. As no response from the FCA had been received, the Commission’s General Counsel chased for a response by email on 30 August 2019.
68. On 12 September 2019 the FCA’s Intelligence Department responded to the Commission’s General Counsel stating that the matter had been reviewed and passed to colleagues in the FCA’s Unauthorised Business Department (“**UBD**”) for their consideration. The email stated that the UBD were hoping to revert back “*early next week*”.
69. On 24 September 2019 the FCA’s Intelligence Division emailed the Commission’s General Counsel in the following terms:
- This morning I received an update from colleagues in our Unauthorised Business Team [UBD] in regards to this enquiry, who after consulting our Legal department have determined that the firm should be dual authorised. The next steps to be taken by UBD are to write to the firm setting out this and asking them to confirm that they will look to regularise their position. UBD are hoping to send the letter out in October.*
70. On 23 January 2020 the Commission’s Licensing Division emailed the FCA Intelligence Department requesting an update on the FCA’s activity, including “*clarity with regards to*

which part of the product offer would/ does fall under the FCA remit.” The email stated: “...we are keen to ensure product offerings are regulated by relevant and appropriate bodies. Furthermore, if dual regulation/ authorisation is required, its vitally important that their terms and conditions/ rules clearly explain which elements are regulated/ authorised by whom...”

71. On 7 February 2020 the Commission’s Licensing Division wrote to BetIndex seeking further information in relation to the Football Index product. The letter stated that, based on the business plan and documents submitted to the Commission in 2015 with BetIndex’s application for an operating licence and subsequent documents, the Commission understood that the Football Index product was based on a business model whereby customers (a) received Dividend payouts based on a footballer’s media and ‘on the pitch’ performances based on a bet which lapsed after 3 years, and that (b) during the three year bet period customers could sell their bets to other customers (at which point the three year bet period would be reset) or cash in the bet with BetIndex for an instant value which was lower than the anticipated sale price.

72. The letter continued:

It has now come to the Commission’s attention that all revenue from an issued share is recognised as gross profit, after deducting pay-outs.

As a result of the above, customers may have the belief that they hold a “portfolio” of bets that are valued at a certain level which is growing in value if the demand for the bet they hold on a footballer increases. Also, it suggests that the portfolio of bets has a minimum guaranteed value equal to the aggregate instate values of the bets at which BetIndex is willing to repurchase them.

It is also not clear how BetIndex can support the underlying value of the outstanding bets by way of instant cash out if all the bet price is recognised as gross profit (after deducting pay-outs).

Based on the above, the Commission has concerns that:

- 1. BetIndex has insufficient assets to support the value of all the outstanding bets which it guarantees to buy back and at marked down price; and*
- 2. In the absence of the above, customers believe they have a portfolio of bets with a tangible value that can never be realised.*

73. The Commission requested financial information including an explanation of where BetIndex held the monies that were used to fund the instant cash out requests; an explanation of what value a customer saw on their accounts for the value of their

outstanding bets (i.e. the balance of their portfolio); an explanation of how that figure was calculated, and an explanation of how that balance changed on a daily basis as the supply and demand of the bets they held on a footballer changed.¹³⁵

74. On 10 February 2020 the FCA's Intelligence Department took part in a telephone call with the Commission. No notes of the call are available,¹³⁶ but the Commission considers that the FCA continued to be of the view that BetIndex should be regulated by both the Commission and the FCA (though the FCA confirmed that BetIndex's risk profile did not meet requirements for the FCA to take action against BetIndex.).

75. On 11 February 2020 the Commission's Compliance Division completed an IRF (reference number 1850) as a result of a complaint from a competitor on 28 January 2020. Complaints received by the Commission about BetIndex are dealt with in the next section of this chapter of the Report at paragraphs 178 to 202 ('Response to Concerns'). The IRF noted that BetIndex had generated £40,411,307 in GGY for 2019, and that the Commission had been provided with information suggesting that there could be detriment to consumers due to the risky business model used. Further concerns raised in relation to BetIndex's business practices included (1) adoption of the term 'stock market', which could be misleading to consumers; (2) the risk of a 'bank run' should customers withdraw their 'investments'; (3) the resemblance of the business model to a Ponzi or pyramid scheme, and (4) that the company's liabilities were increasing. The IRF stated that there had not been any mention of the stock market functionality in the initial licence application; that the Commission had only become aware of that format in March 2018 when it was detailed in a business plan submitted as part of a new licence application.

76. The IRF noted that BetIndex had been the subject of a total of 20 complaints since it had been licensed in 2015: 11 relating to customer service issues, 5 relating to ID verification, 2 relating to promotions, and 1 general complaint about the website. It also noted that BetIndex had recently been subject to two adverse rulings from the Advertising Standards Authority: one on 21 August 2019 found that a Facebook advert for Football Index featuring players under 25 years of age had breached CAP Code (Edition 12) rules 16.1 and 16.3.14 (Gambling); the other on 18 September 2019 found that a sponsored video

¹³⁵ GC Response to written questions from the Review.

¹³⁶ FCA Response to written questions from the Review.

entitled “How to make money from football index” seen on football magazine FourFour Two’s YouTube channel on 12 June 2019, created the impression that the product was an investment opportunity when, in fact, it was a betting product and did not make the associated financial risks clear, in breach of CAP Code (Edition 12) rules 16.1, 16.3.1 and 16.3.2 (Gambling).

77. The Commission’s recommended solution was to engage with BetIndex to understand the full mechanisms of the product, including what was meant by the portfolio and understanding the growth in value, and how BetIndex was ensuring that it had enough funds to meet the gambling liability, together with a review of BetIndex’s website to ensure that the marketing materials were not misleading and breaching the ASA Committee of Advertising Practice (“**CAP**”) and Broadcast Committee of Advertising Practice (“**BCAP**”) guidelines.
78. The response from BetIndex’s solicitors to the Commission’s 7 February 2020 request for information, provided on 11 February 2020, confirmed that as of 10 February 2020 at 2359 hours the total ‘instant sell value’ of all bets was £115m, but stated “...*this should be treated as a theoretical total amount. This amount is not redeemable for all customers. Furthermore, the ‘Instant sell value’ changes as the Football Index market operates. For example, in the course of shares being sold, the price of a share in a footballer diminishes inversely to the original price increase, that resulted in that price. Additionally, the spreads may widen, reducing the ‘Instant sell value’. The variation in the ‘Instant sell value’ is explained in our client’s game rules.*” BetIndex’s annual report and unaudited financial statements for the year ended 31 December 2018 recorded cash as at 31 December 2017 of £1.6 million and as at 31 December 2018 of £9.2 million, and other payables as at 31 December 2017 of £1.1 million and as at 31 December 2018 of £2.3 million. For both years the cash balance was in excess of the other payables by more than 10%, suggesting that other payables were covered by a cash margin of over 110%.¹³⁷
79. BetIndex’s management accounts balance sheets as at 31 December 2019 recorded a player protection account balance of £7.3 million and customer liabilities of £3.8 million, suggesting that customer liabilities were covered by 192%.¹³⁸

¹³⁷ GC Response to written questions from the Review.

¹³⁸ GC Response to written questions from the Review.

80. As to the question of where BetIndex held the monies that were used to fund the instant cash out requests, the response confirmed that *“BetIndex’s cash used to fund the ‘Instant sell’ by customers is held in its main bank accounts. BetIndex manages its cash position and risk position on an ongoing basis and maintains adequate resources to meet its obligations.”* The response stated that BetIndex’s approach had been informed by Commission advice that a betting slip held by a customer which might be redeemed at a later date did not constitute funds ‘held to the credit of customers’ within the meaning of licence conditions 4.1.1 and 4.2.1.

81. In relation to question of whether the BetIndex product was consistent with the requirement of fair and open gambling, on 12 February 2020 in an internal email, a Commission employee set out the following observations:

I think the primary question for us is understanding/determining what customers are betting on? Is it;

- 1. on earning dividends, or*
- 2. on earning dividends and the potential to ‘sell’ bets?*

The answer to that then impacts on our expectation/leverage/risk to the licensing objectives.

1. If we determine it is just the ability to earn dividends, this is primarily, in my view, a transparency issue – one whereby we need to consider if customers are able to make an informed decision as to whether to bet at the terms offered. The licensee would argue the bet is about earning dividends – in their responses they make reference to no automatic consumer right to ‘instant sell’ which as clear parallels to Sportsbook ‘Cash Out’ facilities. Areas to explore may include;

- use of language – parallels to betting on lotteries work*
- Appropriateness of rules/terms and conditions*
- Accuracy of displayed Customer Portfolio Values - they suggest majority of bets are now sold at the ‘buy’ price, having previously advised in late 2018 it was only 40%*
- Sufficient information provision re product risk*
- Appropriate/compliant display of commissions/charges.... - Customers don’t have any knowledge of the average dividends:player price ratio. In reality, this is very low so the real risk within the ‘bet’ is fluctuations in share price.*
- Clarity re (lack of) instant sell functionality and thus risk re no given ability to sell bets*
- Explanation re pricing mechanism for ‘bets’ re buying and selling*
- Advertising – explore the ‘2% said they tended to lose money with Football Index’ claim*
- And probably lots others*

2. If we determine it is about earning dividends and the potential to ‘sell’ bets, the risk is much greater as it includes customer monies held in open bets/ portfolios. It’s important we understand this isn’t about customer funds as per the LCCP, more so the equivalent of unsettled/ open bets. The above transparency areas to explore exist along with financial considerations

- The licensee controls a) the pricing (buying and selling) and b) the ability to sell ‘bets’.*
The licensee would therefore argue the portfolio value of 115m (based on Instant sell) is

just theoretical— it couldn't be realised in a single move due to the pricing and sale controls in place. Are we comfortable with this? It certainly feels unique in that the licensee is acting as the bookmaker and event controller (i.e. the instant sell price). That said, other bookmakers do control the 'Cashout' price and availability.

- *Should they be required to cover all (or part of) to current portfolio values? We wouldn't expect another operator to accept a bet/gamble that couldn't be realised/paid out (link to recent Ante-Post bets work). Also, para 4.2 of our Statement of principles for licensing and regulation requires licensees to, amongst other things;*
 - *maintain adequate financial resources*
 - *have due regard to the interests of consumers and treat them fairly*
 - *have due regard to the information needs of consumers and communicate with them in a way that is clear, not misleading, and allows them to make a properly informed judgment about whether to gamble*
- *I personally would like more information to understand the model. In many ways, the ecosystem feels similar to that of exchanges/poker/pools in that the licensee and traders (think pro punters) will profit off the recreational customer base which is needed to support the system. I would like to understand the 'lifetime estimated value' of each player/bet. What's the churn rate for players (new ones verses those no longer listed)? What's the difference between Total 'Buy' Value paid for all bets verses Current 'Instant sell' Value? What's the relationship between players with added value and those with lower values (both considered against the purchase price)? Mix between traders and recreational customer base. How can they evidence that they don't just have an ever-growing eco-system that means that in the medium/ long term bet values will just crash?*

Suggested next steps

1. *We need to be mindful to avoid any actions that could have a (significant) negative impact on consumers portfolio values? I fear that licence review/suspension would have the opposite effect of what we are wanting to achieve*
2. *We accept their offer of a meet at VSH. To happen quickly (early next week) – us to set the agenda based on agreed lines of enquiry.*
3. *We could consider interim steps to avoid portfolio values growing any further (i.e. no more Initial Player Offerings, require constant availability of Instant Sell...). Any such steps would need thinking through carefully re point 1. **Personal view – I am not convinced that portfolio values are at significant short term risk.***

We need to be mindful to avoid any actions that could have a (significant) negative impact on consumers portfolio values...Personal view – I am not convinced that portfolio values are at significant short term risk.”

82. An IMG review of IRF 1850 on 13 February 2020 noted the serious concerns and recommended that the Commission's existing cross-team working group should continue to progress the matter urgently to inform next steps.

83. On 14 February 2020 a Commission case team meeting agreed that the best approach would be a Skype meeting with BetIndex for the operator to do a walkthrough of the product/customer journey from beginning to end and answer questions in areas of concern. Among the actions recorded was *“Follow up with the FCA – we need to understand if the FCA are interested or not interested and if not why not, get them to provide their view on why it is or isn’t spread betting and clarify if this does/ does not fall in their remit and action taking if any.”*
84. On the same day a senior member of the Commission’s Licensing Division contacted the FCA Intelligence Department stating that, as the matter was now deemed complex it had been escalated to her and other colleagues, and the Commission wanted to establish the view of the FCA in terms of decisions about where regulatory responsibilities lay. The Commission also carried out reviews of the Football Index website on 14 and 19 February 2020, which noted that the operator placed the onus on the consumer to review the terms and conditions as continued use would signal agreement to the changes, and that the terms and conditions had last been updated on 24 August 2017.
85. On 21 February 2020 a member of the Commission’s Consumer Policy Department contacted the Committee of Advertising Practice in relation to a BetIndex tutorial on YouTube and podcasts showing images of football players aged under 25, to enquire whether they would fall under CAP remit. The ASA responded that, whilst the tutorial was definitely an advertisement, it was unclear if the podcasts were within the ASA’s remit. However, the image and the brand were the problem and they were separate from the audio.
86. On the same date BetIndex provided supporting documentation requested by the Commission, including updated terms of use, an advertising policy, a safer gambling policy, an age verification procedure, an AML/CFT policy and a risk assessment. BetIndex stated that it was aware that its current terms of use were out of date in some areas, and had been working hard to implement changes in recent months with legal advice.
87. On 24 February 2020 a senior member of the Commission’s Consumer Protection & Empowerment Department noted that, in light of the ASA’s response to the

Commission's query, BetIndex was very likely to be in breach of the UK advertising codes and the LCCP.

88. On 25 and 26 February 2020 the Commission's multi-disciplinary team conducted a full compliance assessment of BetIndex which included:

- a. Following a customer's journey around the Football Index website assessing matters such as marketing and advertising, unfair terms and safer gambling controls. The website review also involved compliance officers logging on as a consumer through a test account to understand what information was available behind the account sign-in screen.
- b. Reviewing BetIndex's policies, procedures and risk assessments to check that the key regulatory risks to the business had been identified and effective controls to mitigate those risks had been implemented.
- c. Examining training records to ensure that staff and key persons within the business were adequately trained.
- d. Reviewing the corporate governance structure and internal audit processes.
- e. A video-conferencing call where the Compliance team asked BetIndex to use the share-screen facility to show back-office data in relation to 9 customers picked at random from customer reports and other gambling-related records. This included reviewing their activity on the Football Index platform, including deposits, withdrawals and account balances. The Commission also reviewed BetIndex's customer risk profiles, records of interactions and evidence collected for due diligence checks.¹³⁹

89. The compliance assessment identified a number of concerns relating to the product and processes, procedures and controls in place:

- a. The language used to describe the product to consumers made reference to a

¹³⁹ GC Responses to written questions from the Review.

market and appeared to have been based on regulated financial products. The website did not explicitly state that it was a betting and not a financial (share) product. There were serious questions as to whether this ‘market’, given its presentation and set up, should be licensed as a gambling product. The Commission felt that this was not in any way a traditional bet or real event that the licence was designed to accommodate. It was noted that the licensee had approached the FSA prior to applying for a gambling licence, and the Commission determined to request further information about the advice received.

- b. BetIndex had not had its website reviewed for compliance with the Consumer Protection from Unfair Trading Regulations. Although a law firm was now reviewing the terms and conditions, they had not been reviewed since 2017. The Commission believed that a term in the terms and conditions which stated that BetIndex could amend prices would be in breach of the Consumer Rights Act if customers were not notified of the changes.
- c. The value of the market and the players’ values within the market could be directly impacted by BetIndex, which advised that it could and had adjusted the market value of the Shares to ensure the stability of the market and enhance the customer experience. BetIndex could adjust the market value by:
 - i. creating new Shares;
 - ii. buying and selling Shares through their own account run by their ‘market maker’; and
 - iii. adjusting the algorithm.
- d. The market maker reported directly to the board but was not subject to independent oversight, could buy and sell to impact the market but had insider information which was not available to other players and a detailed understanding of the algorithm. There was only one market maker who worked 7 days per week.
- e. Given the complex nature of the product and the fact that the market was able to impact the outcome of the ‘event’, there was a question as to whether the product was suitable for a gambling licence.

- f. It was unclear whether the current product reflected the product presented to the Commission at the stage of the licensing application in 2015. There had been no reference in the application to selling players, or to creating a market to sell players. The product now on offer was much more complex and had moved significantly away from the basic model. The Commission did not consider that it would have licensed the product as it stood now.

- g. It was unclear whether the Commission needed to intervene in relation to the financial risk. BetIndex advised that there was currently around £115 million worth of trading in the market, which was the current cash out value of all the Shares at the instant price value (the price which BetIndex would pay the player). BetIndex could only cover around 15% of that liability at present. Within that Share value was included £2.9 million Share portfolio derived from activity carried on in BetIndex's 'market maker' account. The Commission noted that customer funds were protected at medium level, which meant that all consumer funds not committed to a bet (i.e. within the consumer e-wallet) could be withdrawn. The Commission considered that if the market stayed stable there should not be any short-term risk.

- h. It was unclear whether Football Index was actually a betting product. The Commission considered that it needed a clear explanation from BetIndex as to what the exact event was that was being wagered on. Whilst BetIndex's licence was for betting on real events, the 'real event' for the BetIndex product was actually determined by a number of factors including the number of Shares purchased in a player and other factors such as social media activities. BetIndex had some control over a number of mechanics in the player market.

- i. Values were placed on Shares by an algorithm, but there was no guarantee that that value could be realised unless there were players in the sell queue offering that amount. The Commission considered that it needed a clear breakdown of the algorithm to be reviewed by a betting and financial specialist but the Review is not aware of evidence to suggest that this occurred.

- j. The Commission was unsure how the internal audit and compliance function worked. Compliance did not appear to be involved in internal audits.
- k. Financial thresholds for safer gambling and AML checks appeared to be set too high.
- l. There were no active checks on affiliate advertising content, though improvements were being made.

90. In its brief summary report following the assessment the Commission noted that it should consider internally whether there was any immediate risk to consumers which needed to be addressed promptly; what the impact of regulatory action or suspension would be on consumers who already held Shares, for example a run on withdrawal and collapse of market value, and whether BetIndex's ability to alter the 'event' which was subject to the bet might be a cheating offence pursuant to section 42 of the Gambling Act 2005.

91. The Commission has told the Review that the compliance assessment demonstrated that BetIndex held sufficient funds to cover the amounts in customers' e-wallets and the payment of future Dividends. Whilst BetIndex did not hold sufficient monies to cover the value of the 'instant sell' value of the portfolio, the algorithm would enable a reduction in Share value in the event of a mass customer sell-off. The mechanism had the ability to reduce the Share values to nil, which would have the effect of reducing Share portfolios to nil, leaving only the additional value of future Dividends generated during the remaining period of the Future to be paid out.¹⁴⁰

92. In an internal email on 27 February, a member of the Commission's Compliance Division stated: *"I have some serious concerns in relation to both the product and the licensee's processes and procedures...the licensee is currently in no doubt that we have concerns in relation to the presentation of the product and concerns around the Fair and Open requirement with regard to the activities, being conducted by them, which can impact the share price."*

93. On 28 February 2020 BetIndex submitted a Key Event notifying the Commission that customer monies, in addition to being held in a segregated bank account, were also now

¹⁴⁰ GC Response to written questions from the Review.

subject to a deed of trust. The signed Deed of Trust dated 18 February 2020 was attached. It defined customer funds as including “...any crystallised but as yet unpaid loyalty or other bonuses in respect of any customer, in each case, irrespective of whether the Company and the customer are party to any Bet.” The Commission has told the Review that it reviewed the Deed of Trust, and considered that the protection of customer funds met the Commission’s medium level of protection. The Commission noted that clause 2.2.1 of the Deed stated that “the claims of Customers are to be paid from the Client Bank Account Monies in priority to all other creditors.”¹⁴¹

94. On the same day a senior member of the Commission’s Licensing Division contacted the FCA’s Intelligence Department seeking to “revisit the time to discuss our concerns”.
95. On 2 March 2020 the Commission commenced its enforcement casework in respect of BetIndex. The Commission has told the Review that in 2020 there were on average 72 enforcement cases per month, with a peak of 108 in March.¹⁴²
96. On 4 March 2020 the Commission held a teleconference with the FCA (attended by members of the FCA’s Intelligence Department and UBD). The Commission’s notes of the call record that:
 - a. The FCA stated that “in cases where you have a ‘technical’ breach, i.e. someone doing something in that gambling sphere, and where they happen to fall within regulatory activity, we may decide legally they fall within that space, but not a priority for the FCA. So more concerned in cases where people are losing money as an investment.”
 - b. The Commission then asked “so in cases where you have people saying they’re sacking off their ISA to go on BetIndex. Two prices: the ‘price’ of the portfolio and the money that actually sits behind that. £115m vs 15% of actual value. Would this not raise issues?”
 - c. The FCA response was that “it would come down to the risk assessment. One of things we look at is what understanding does individual have when they make the investment. This will contrast with people who are cold called to advise. Feels there’s still fundamentally an understanding it’s a punt, and there’s some gambling involved. Would welcome more info though

¹⁴¹ GC Response to written questions from the Review.

¹⁴² GC Introduction to Responses to written questions from the Review.

and will not say never...Something else that would helped [sic] – consumer reports of alleged losses or concerns. This would have greater priority. Twitter may give good insight, but this isn't enough.”

- d. The Commission then asked *“what about the language they use i.e. around investing?”*
- e. The FCA responded *“yeah that's not helpful, but it has to be put in context of risk register because the website itself isn't frame in the context of an 'investment' i.e. it's not being advertised as such for financial advisors etc.”*

97. The agreed actions from the meeting (as recorded by the Commission) included the Commission considering whether it held any further information which it could share to assist the FCA in its decision making/risk assessment, and the FCA reviewing and considering further whether any aspect of the BetIndex product fell within its remit. The Commission suggested that a date for a response from the FCA be provided. On 5 March 2020 the FCA's Intelligence Department confirmed to the Commission that it would forward the action points on to the members of the UBD who had been on the call, and that the FCA would revert back once it had consulted internally.

98. On 6 March 2020 the Commission conducted a further compliance assessment in relation to BetIndex and requested details of whether the funds held in the account described in the 28 February 2020 Key Event were specifically the customer bet or whether other funds were held.

99. On 10 March 2020 the Commission instructed leading counsel to give an opinion as to (1) what were the 'events' on which bets were being placed in the context of the Football Index product, and (2) whether the use of a 'market maker' meant that BetIndex was committing a cheat offence under section 42 of the Gambling Act.

100. In an email response to the Commission on 12 March 2020, BetIndex confirmed that the segregated bank account took all incoming funds from BetIndex's payment provider, but that the total of the account was compared against the total customer balances held within the platform on a daily basis, and that *“We maintain a constant level of coverage of at least 110% of the funds required to pay all cash balances.”*

101. By this stage in 2020 there was widespread concern that the spread of the Covid-19 pandemic would lead to restrictions on many aspects of everyday life including the holding of sporting events. On 16 March 2020 a Commission employee stated in an internal email:

Over the weekend I have seen discussion around what happens to football bets if the season gets cancelled, concluded based on current positions, finalised in due course. I have email Comm and a few colleagues separately about that.

It then got me thinking about BetIndex and whether COVID-19 has/could create a 'bank-run'....Appreciate you may already be well on top of this, but I thought it best to just share my thoughts.

Not sure what we should do, if anything at all?

102. A member of the Compliance team responded that *"I believe that compliance are asking what contingency plans are in place due to COVID19."*

103. On 18 March 2020 the 'instant sell' function allowing Football Index customers to sell their Shares to BetIndex was suspended.

104. On 19 March 2020 the Commission received in draft the legal opinion of the leading counsel whom it had instructed, which was to the effect that either the purchase and resale of Shares was probably governed by FSMA, or the whole Football Index product fell to be regulated under that Act. He also concluded that the use of a market maker did not mean that BetIndex was committing a cheat offence under section 42 of the Gambling Act 2005. In the course of his Advice he stated: *"...it is important to remember that the entire basis of this product is that BetIndex sets the rules, the prices, the amounts of dividends and so forth. Players who choose to play the game are aware of that. If next week, BetIndex were to reduce the amount of dividends by half or discount all repurchase prices by 10% no player could have a complaint. They would not in any objective sense have been cheated. They have are [sic] aware when they go into the arrangement that all payouts are in the hands of BetIndex."* The Commission has told the Review that the ability to change odds in the market is one that exists in the industry, and is not unusual.

105. The Commission has told the Review that following its compliance assessment of BetIndex in February 2020, the working group dealing with the matter reported back to the Commission’s CMG in March 2020, which endorsed the decision for preparations to commence for opening a formal licence review under section 116 of the Gambling Act 2005. It was then a matter for the working group to obtain evidence, obtain a legal view on the sufficiency of the evidence for the purposes of any review, and formally open the review. The question of whether BetIndex’s licence should be suspended was considered at the CMG meeting, but discounted because of the Commission’s continued engagement with BetIndex and what the Commission understood to be the FCA’s agreement that it would jointly regulate the BetIndex product. The meeting minutes recorded that monitoring of social media had indicated that *“most of the messages on the forums today indicate that their customers are still holding on to their shares and nobody appears to be trying to withdraw their money out of the business.”* The Commission states that it did not instruct BetIndex to stop onboarding new customers due to concerns that that this would cause consumer panic.¹⁴³
106. The Commission has told the Review that from March 2020 the Commission had to deal with an increased workload as a result of the Covid-19 pandemic, including the introduction of new guidance on customer interactions; the banning of reverse withdrawals; carrying out a consultation on affordability involving thousands of responses; conducting enhanced monitoring of online operators to assess changes in customer behaviour during lockdown; contributing to the ongoing Review of the Gambling Act 2005; implementing the Fifth Money Laundering Directive,¹⁴⁴ and producing and updating AML guidance in light of Brexit.
107. On 1 April 2020 the Commission communicated its compliance assessment findings to BetIndex, in particular that as a result of the failings identified during the assessment the matter had been referred to the Commission’s Enforcement team to consider opening a regulatory investigation. The latter identified the Commission’s serious concerns relating to BetIndex’s management of risks to the Licensing Objectives and compliance with the LCCP, in particular the fair and open provisions, AML and terrorist financing controls

¹⁴³ GC Response to written questions from the Review.

¹⁴⁴ Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU.

and proceeds of crime procedures, the approach to social responsibility and findings in relation to marketing and the website. The letter also requested that additional information be provided within 7 days.

108. Annex A to the letter identified the breaches of requirements, including suitability to hold a licence on the basis that BetIndex had provided misleading information at the time of the licence application in relation to the product that was to be offered, and the activities of the market maker. Other concerns included that certain terms and conditions were in breach of licence condition 7.1.1 (Fair and transparent terms and practices) and the Consumer Rights Act 2015, that the presentation of the product contravened Regulations 5 and 6 of the Consumer Protection from Unfair Trading Regulations 2008, SR code 4.2.6 paragraph 1(g), and that BetIndex was unable to provide evidence of any steps taken to check that the current terms and conditions were not unfair, in breach of SR code provision 4.1.1.
109. The letter required BetIndex to take steps to ensure that its product and its presentation to consumers, and the terms and conditions associated with the product, did not contravene licence condition 7.1.1. It also sought as information any internal and/or external advice which BetIndex had received discussing whether the buying and selling of Shares in football players was classed as a regulated activity within section 22 of FSMA, to include details of any discussions with the FCA in relation to the product before and/or after the licensing application was filed with the Commission. The Commission also requested, in light of the current situation with COVID-19 and the Football Association's decision to suspend football league fixtures, details of any contingency plans in place to ensure that BetIndex remained operational.
110. On 3 April 2020 a senior member of the Commission's Licensing Division contacted the FCA Intelligence Department by email to make the FCA aware of the legal advice which it had received that the buying of Shares fell within FSMA and to seek another meeting. The email stated that *"The Commission's concern is that while the operator is currently licenced by the Commission, only a small element of the product offered by this operator falls within the remit of the Gambling Act 2005. We are concerned with the risk this poses to the consumers by that element not regulated by the Gambling Commission. It would be helpful if we could discuss this further."*
111. On 14 April 2020 BetIndex provided a detailed response to the Commission's

compliance assessment findings. The information provided included:

- a. That solicitors had approached the FSA in 2011 to seek clarification as to whether Fame500, the initial concept which evolved into FootballIndex, would be considered a regulated activity as defined in FSMA. The FSA response had been that Fame500 was unlikely to be a regulated investment. As Football Index's key feature was a 3 year bet, BetIndex believed that it was a gambling product and not a regulated activity within section 22 of FSMA.
- b. BetIndex had obtained legal advice from a firm of solicitors at the beginning of April 2020 which expressed the view that it was far from clear that Football Index fell within the ambit of FSMA and, in any event, the FCA was *"unlikely to have any appetite to regulate this type of sports bet as it is neither a binary bet nor a spread bet"*.
- c. BetIndex had instructed a firm of solicitors from July 2019 to revise the terms and conditions for Football Index, including consideration of their compliance with consumer law generally, and in particular the Consumer Rights Act 2015 and the Consumer Protection from Unfair Trading Regulations 2008. The new terms and conditions had gone live on 7 April 2020. The new terms and conditions expressly referenced the 'Market Maker' at clause 9.13, and FAQs about the Market Maker could be accessed via a link in the terms and conditions. Though previous versions of the terms and conditions had made no direct reference to a trading account being used to buy and sell Shares to help put liquidity in the market, from 2017 there had been a reference to a Market Maker being able to buy bets when players joined the sell queue. BetIndex's submissions attached screenshots from 2017 and 2019 showing messages viewable in the user interface of the website and the App since October 2015 which made reference to the Market Maker being able to buy bets in the Sell Queue. BetIndex stated that the messages had been inadvertently omitted following a major platform upgrade in December 2019 (for the website) and January 2020 (for the App), but had since been re-instated. The submissions enclosed a draft Market Maker & Risk Management Policy dated 30 March 2020.
- d. A detailed record of changes to the pricing algorithm had not been kept prior to 22 March 2019. While substantial changes were made infrequently, some 233

changes had been made to the algorithm between 22 March 2019 and 31 December 2019. A new procedure was now in place requiring approval for changes to the algorithm. An overview of the operation of the price algorithm was provided.

- e. The total market as at 31 March 2020 was £132,643,784. That value represented the aggregate of the ‘Value’ field for all customers’ portfolios, the ‘Value’ field representing the aggregate current ‘buy price’ of all bets currently held by the customer.
 - f. In response to the COVID-19 situation, BetIndex had reviewed its safer gambling controls and reduced thresholds. The company was treating the lockdown period as a longer ‘between season’ period. In the absence of football-related Dividends, the media Dividend had been increased. BetIndex stated: *“Customer fund contingencies are reviewed daily as per our normal processes and procedures. We hold funds in a segregated trust protected account and maintain a margin of 110% or greater at all times. This is reported to the Board and indeed signed off by BetIndex CEO on a daily basis.”*
 - g. The Commission had been informed of the ‘cash-out early’ function by Fame Ventures’ solicitors logging of a Key Event in April 2015. In the licence application on behalf of BetIndex SMP Partners had relied heavily upon the business plan used for the previous application by Fame Ventures, but had not taken into account the Key Event submitted subsequently.
112. On 16 April 2020 the Commission’s Licensing Division sought further engagement with the FCA and a meeting.
113. On 21 April 2020 the leading counsel instructed by the Commission provided further advice in which he disagreed with the view reached by BetIndex’s solicitors, and reaffirmed his view that all or part of BetIndex’s activity fell within the definition of regulated activity under FSMA. He noted expressly that *“the test for whether something is a regulated activity is not whether the FCA chooses to regulate it.”*
114. On 30 April 2020 the FCA Intelligence Department responded to the Commission’s email of 16 April 2020 stating that the FCA UBD would be in touch. On the same date

the FCA's UBD had a teleconference with the Commission at which the Review is informed by the FCA that the UBD confirmed that it had reviewed the additional information provided by the Commission, but did not think it could take the matter forward because of legal uncertainty, the activity being gambling and because the Commission was best placed to carry it forward.

115. On 7 May 2020 BetIndex provided a letter of response to the Commission's findings dated 1 April 2020, in which it stated "*...we appreciate that our business model is new and innovative, and consequently performs differently from that of a standard sports book operation. We appreciate that this presents some new challenges from a GC oversight perspective...*" The response also stated that "*due to the concerns relayed by the GC, to ensure that there is further clarity with respect to the nature of the product, we have added further wording to make clear and underline that the product is a betting product. We have updated our landing page and include a banner throughout our platform, which is presented prominently, to bring customer clarity on our betting product.*" The response provided a screenshot of the banner, which stated: "*Football Index is a real money virtual stockmarket licensed and regulated by the Jersey Gambling Commission and the UK Gambling Commission. This is a betting platform and should not be viewed as an investment vehicle.*"

C. Review of Licence in 2020/21

116. In May 2020 the Commission escalated its regulatory actions in relation to BetIndex. On 20 May 2020 the Commission wrote to BetIndex giving notice of a formal licence review under section 116(2) of the Gambling Act 2005 to consider BetIndex's suitability to carry on licensed activities. The letter stated that "*Commission officials have concerns regarding the Licensee's business model, integrity and or competence. This is due to the failings identified in the compliance assessments and concerns relating to potentially inaccurate information provided at the time of the initial licence application.*"
117. The letter rehearsed the key findings from the compliance assessment in February and March 2020:
- a. That in respect of several terms and conditions on its website BetIndex was not compliant with the requirement that licensees must ensure that the terms under

which gambling is offered are not unfair within the meaning of the Consumer Rights Act 2015 (breach of licence condition 7.1.1).

- b. Weaknesses in BetIndex's AML controls (breach of licence condition 12.1.1).
- c. Insufficient terms in third party contracts to allow the termination of those contracts where digital advertisements were placed on copyright-infringing websites (breach of licence condition 16.1.1).
- d. Insufficient processes in place to identify customers who might be at risk or experiencing harms associated with gambling (failure to comply with Social Responsibility Code Provision ("SRCP") 3.4.1).
- e. BetIndex was unable to evidence that the terms and conditions in place at the time of the assessment were not unfair (failure to comply with SRCP 4.1.1).
- f. Displaying insufficient information to consumers in relation to the means or medium by which the outcome of an event would be determine (failure to comply with SRCP 4.2.6).
- g. Marketing material available on the Football Index website and YouTube channel was not age gated and was accessible to children. Further, some marketing material had content including football players under the age of 25 (failure to comply with SRCP 5.1.6).
- h. Significant conditions applying to a money back offer lacked prominence in the advertisement (failure to comply with SRCP 5.1.9).

118. The Commission has told the Review that it did not consider that it had grounds to suspend BetIndex's licence on 20 May 2020. At that stage, the Commission had actively been scrutinising BetIndex since 2019, and considered that it had agreement from the FCA that the FCA had at least partial regulatory remit of the product.¹⁴⁵ It should be noted that this conflicts with the FCA's position, as described in chapter 6, that the FCA

¹⁴⁵ GC Response to written questions from the Review.

had made clear to the Commission in February 2020 that the FCA would not be proceeding to regulate BetIndex.

119. The Commission has told the Review that it had increased the resources dedicated to the BetIndex case, expanding the multi-disciplinary team involved. According to the Commission, its predominant concern was to ensure that any action it took did not have unintended consequences which could exacerbate a complex situation involving customer funds and Share portfolios. The Commission considered that there was a risk that suspension action could have a negative financial impact on the business and its customers. In addition, the Commission had no reason in May 2020 to believe that BetIndex's finances were threatened, that customers might be denied access to their account wallets, or that BetIndex would not continue to engage meaningfully with the Commission in pursuit of regulatory compliance.¹⁴⁶
120. On 22 May 2020 the Commission's Licensing Division emailed the FCA's UBD to follow up on previous correspondence in respect of BetIndex.
121. On 8 June 2020 a teleconference took place between the Commission and the FCA's UBD. The Commission took notes of the call, but the FCA did not. According to the Commission's Notes, the UBD stated that

While [the situation with BetIndex] remains novel and not without risks, the reality is that with the impact of Covid/Brexit, they are being asked to think carefully about the cases they take on. Their workload volume has increased from 120 to now about 171 new cases a day and as a relatively small dept they need to assess where the risk lies and where they can identify consumer harm. Internally BetIndex is having to compete with a lot of other cases. BetIndex sits alongside that context and the position is where the consumers know they may lose money, the case is not as strong as those consumers who have made financial investments. This is not a priority they can take forward right now. They have taken seriously the points made in the email from the GC and fully appreciate the position GC finds itself in. While an absolute final decision has not been made, this case simply is not hitting the same marks as the other cases are and very unlikely to be taken forward.

They did not write out the firm in October last year following the initial FCA/GC engagement – someone moved on and it was not picked up, it was then considered by their General Counsel

¹⁴⁶ GC Response to written questions from the Review.

Division and concern raised that they would be writing out in circumstances if they were not going to follow up (due to resources/priorities).

[The FCA representative] noted one area she has struggled with, given the facts of this case: how does it compete in wider unauthorised perspective: if it does not compete well against others, then in what circumstances could the FCA take it on. She is seeking to pull together criteria for when they can. She does not yet have clarity on that – it is a policy matter that their policy team will assist with. This is a work in progress and delayed due to Covid impact.

122. On 2 July 2020 the Commission’s Enforcement team had a meeting with BetIndex at which presentations were given in relation to the Football Index product and an update on steps taken by the company to improve its compliance.

123. On 9 July 2020, at around the time that football fixtures resumed following the lockdown as a result of the Covid-19 pandemic, BetIndex increased the amount of Dividends to be paid out by around 30%. The Commission was not provided with any contemporaneous information in relation to the increase in Dividends.¹⁴⁷ The BetIndex game rules were changed on the same date.

124. On 16 July 2020 the Commission’s Enforcement team wrote to BetIndex’s solicitors stating:

As you are aware, the Licensee was issued a remote operating licence by the Commission in September 2015. At that time, we were informed that the business model consisted of a bet (a ‘share’) which yielded ‘dividends’ to customers on the basis of a football player’s performance across a number of metrics. Since the Licensee’s licence was issued the product has significantly changed and now contains a component which allows for the buying and selling of those shares.

During the course of our engagement with the Licensee, the Commission has re-examined the Licensee’s product in greater detail, including the new components which did not form part of the original licence application. These enquiries have led us to conclude part of the Licensee’s product falls outside of the Commission’s regulatory remit.

125. The letter stated that the Commission was of the view that the original Dividend aspect of BetIndex’s product was applicable to be regulated as a betting prize competition under section 11 of the Gambling Act 2005. However, the new product feature of allowing players to buy and sell Shares from BetIndex, introduced after BetIndex was licensed by

¹⁴⁷ GC Response to written questions from the Review.

the Commission, was a contract for difference and hence a regulated activity for the purpose of section 22 of FSMA. By virtue of section 10 of the Gambling Act 2005, that aspect of BetIndex's product fell to be regulated by the FCA.

126. The letter continued:

Next steps

As a result of the above, the Commission has concerns consumers may be under the impression that all products provided by the Licensee via its website fall under the regulatory remit of the Commission and afforded protections under the Act. As the Commission is of the view this not to be the case and to ensure full transparency for consumers the Commission requires the following to be actioned within 21 days of receipt of this letter:

- *the Licensee to update its website so that consumers are aware of which aspect of the product falls under the Commission's regulatory remit*
- *the Licensee to take appropriate steps to ensure compliance with UK law in relation to its licensable activities. This should include, in the first instance, making contact with the FCA regarding the activities which fall under their remit and take the necessary steps to become compliant with the FSMA's regulatory regime.*

Should the Licensee fail to take the above steps, the Commission will consider whether the Licensee is suitable to carry on the licensed activities, including giving due consideration to all regulatory options available. This may also have an impact on the conclusion of the ongoing licence review.

127. On 21 July 2020 BetIndex's solicitors requested that the Commission provide the legal basis of its opinion that part of BetIndex's product was a regulated activity for the purposes of section 22 of FSMA.

128. On 3 August 2020 the Commission's Enforcement team wrote to BetIndex's solicitors providing what was in effect a summary of leading counsel's advice in relation to regulation of BetIndex's product.

129. On 10 August 2020 BetIndex wrote to the FCA's General Counsel requesting individual guidance pursuant to section 139 of FSMA and SUP 9.2.6G as to whether the Shares involved in its product, or the arrangements for buying and selling the Shares involved a specified investment under FSMA. The letter attached legal and expert financial advice which BetIndex had obtained expressing the view that BetIndex was not providing a contract for differences and was therefore not subject to FSMA. The Commission was provided with a copy of BetIndex's legal advice on the same date.

130. On 26 August 2020, following feedback from its customers BetIndex increased Dividends by around 100% compared to the previous season, with effect from 12 September 2020. No contemporaneous notice of the change was provided to the Commission.¹⁴⁸
131. On 3 September 2020 BetIndex wrote to the Commission’s Enforcement Division with a proposal to separate the ‘bet’ and the ‘market’ elements of its product by establishing the exchange in Tradex Ltd, an entity incorporated in Gibraltar.
132. At some point in September 2020 BetIndex issued what it described as a product enhancement announcement which stated that *“with the unprecedented loss of Football and with widespread selling panic we saw at the onset of the Covid 19 lockdown, the House had to take the decision to suspend Instant Sell liquidity (as allowed for in our game rules) due to a high degree of volatility relating to the emerging situation. That volatility encouraged some ‘panic’ cashing out of bets, and the reduction and suspension of Instant Sell was effective in stabilising prices in the Football Index market.”* The Commission had not been provided with any contemporaneous information regarding BetIndex’s decision to suspend the ‘Instant Sell’ feature of its product.¹⁴⁹ The announcement went on to detail BetIndex’s introduction of a ‘Bid Engine’ feature in order to create a *“secondary market’ style opportunity”* for users.
133. On 16 September 2020 the FCA’s Supervision Hub provided BetIndex with its response to the request for individual guidance (**“the Individual Guidance”**), which stated that *“The FCA’s view is that the shares are likely to amount to a specified investment under article 85 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (“RAO”). However, we note that ultimately matters relating to the perimeter are decided by the courts and not the FCA.”* The response continued: *“Based on the information that we have, the “share” in a player, can be viewed a [sic] single contract, with all of the potential dividends under the contract representing the profit arising under the contract.”*
134. On 30 September 2020 a member of the Commission’s Licensing Department contacted the FCA’s UBD and Intelligence Department seeking a further meeting to discuss

¹⁴⁸ GC response to written questions from the Review.

¹⁴⁹ GC Response to written questions from the Review.

updates on the Commission's current thinking about BetIndex and the issue of dual regulation.

135. On 1 October 2020 the FCA's Intelligence Department responded to the Commission's email by referring the Commission to the FCA's UBD "*given this clearly is a perimeter issue*".
136. On the same date BetIndex made a market announcement in which it stated: "*...we have engaged with financial regulators with the objective of holding a licence that is more appropriate for our 'market' than our current 'betting' licence.*"
137. On 2 October 2020 the Commission was provided by BetIndex's solicitors with a copy of the FCA's Individual Guidance. The letter stated that BetIndex would prefer to await the FCA's view before determining any changes that might be made to BetIndex's website.
138. The Commission chased the FCA UBD for a response on 9 and 16 October 2020. The FCA UBD reverted on 26 October 2020 providing contact details of the relevant FCA team.
139. Also on 26 October 2020, BetIndex contacted the FCA to postpone a meeting on the basis that BetIndex disagreed with the FCA's Individual Guidance and wanted to seek further legal advice before the meeting.
140. On 27 October 2020 the Commission wrote to BetIndex's solicitors maintaining its previous view that the buying and selling of Football Index Shares was a specified investment under the RAO, and stating that it considered that sufficient time had been provided for BetIndex to fully consider its position. The Commission required, as a matter of urgency, for BetIndex to outline in detail how it planned to update its website so that consumers were aware of which aspect of the product fell under the Commission's regulatory remit, and stated that should BetIndex fail to act to remedy "*this confusion*", the Commission would have no option but to consider further regulatory action. Detailed proposals, including proposed dates for implementation, were requested by no later than 4 November 2020.

141. On 5 November 2020 BetIndex’s solicitors wrote to the Commission noting that the FCA’s Individual Guidance took the position that BetIndex’s “product” should be regulated by the FCA, a position markedly different to that adopted by both the Commission and BetIndex. BetIndex therefore intended to seek advice from leading counsel who was a leading practitioner in financial services regulation. BetIndex undertook to make changes to its website subject to the legal opinion to be obtained and any further discussion with the Commission, and stated: *“Broadly, it seems to the Licensee that there would be no consumer benefit to these major changes being implemented until all the parties have absolute clarity on these matters.”* The Commission replied on the same day confirming an extension to the deadline.
142. On the same date, the Commission met with the FCA’s UBD perimeter team. The Commission informed the FCA that it had been informed by BetIndex that it had received an individual guidance note from the FCA indicating that the FCA had full remit over the product on offer. The FCA representatives noted that if an application was made for permission to be regulated by the FCA, that would involve the FCA’s authorisations team. The FCA stated that it had been planning to engage with BetIndex regarding FCA regulation in September 2019, but that subsequently,¹⁵⁰ due to resource and their risk profiling, this was not taken forward. The FCA also clarified that it was not definitive that the operator required dual regulation. It was agreed that the Commission would seek a copy of the guidance note. The issue of dual regulation more generally was also discussed. The Commission noted that Football Index was quickly approaching top 10 of GGY.
143. On 8 November 2020 the Commission’s leading counsel provided further advice in light of the FCA’s Individual Guidance response, maintaining his previous view that the product should be regulated by both the Commission and the FCA.
144. On 10 November 2020 in a call between the Commission’s Enforcement Division and the FCA Supervision Hub, the FCA repeated its view that the product should be regulated by the FCA. The FCA advised the Commission that the application process for

¹⁵⁰ The minutes of this meeting state that this decision was taken in June 2020. The FCA has advised the Review that it considers that the reference should be to February 2020.

FCA regulation, including responses from BetIndex and the possibility of the need for a wider FCA review, might take between 6 months and a year to process.

145. On 18 November 2020 BetIndex wrote to notify the Commission that it had received oral advice from leading counsel that he did not consider the Football Index product to fall within Article 85 of the RAO such that it should be regulated by the FCA. A written opinion to that effect was expected by the end of November. The letter stated: “...*given the current uncertainty surrounding the regulatory status of the product, and the need to have the FCA revisit its individual guidance, we would like to propose that we do not make any updates to the Football Index website until certainty regarding its regulation is achieved...in our opinion, and changes at this stage would present a risk to consumers and, potentially, undermine the second Licensing Objective.*”
146. On the same date BetIndex’s solicitors wrote to the FCA to notify them of the advice which BetIndex had received from leading counsel and to request that the FCA review its Individual Guidance upon being provided with the written advice. The written advice was subsequently provided to the Commission and the FCA in December 2020.
147. On 14 December 2020 the Commission’s General Counsel contacted the FCA General Counsel seeking to arrange a lawyer to lawyer discussion to reach “*a mutually agreed position moving forward about where these products sit within each of our regulatory frameworks.*” The email stated: “*“I am contacting you directly because we consider that the consequences of a determination that BetIndex’s product is regulated by the FCA, rather than the Commission, will have material consequences for BetIndex. Unfortunately this gives rise to a strong probability of litigation against the Commission and the FCA by BetIndex in order to protect their position, particularly as they have already indicated they wish to remain regulated by the Commission.”*”
148. The FCA’s General Counsel responded by email on 15 December 2020 explaining the position reached by the FCA in September 2020 and stating:

“The guidance provided to BetIndex is, of course, only the FCA’s view of the matter and, ultimately, the view taken by the Courts may differ to that of the FCA. I also acknowledge that the BetIndex product is not one falling within the traditional financial services, and that the position we take may have policy implications for both the Gambling Commission and the FCA, as well as the UK gambling industry.”

149. On 17 December 2020 BetIndex’s solicitors wrote to the FCA enclosing a copy of the written advice which BetIndex had obtained from leading counsel, formally requesting the FCA to review its Individual Guidance. They also wrote to the Commission to inform them that BetIndex had formally invited the FCA to review its Individual Guidance. The letter attached the written opinion which BetIndex had obtained from leading counsel, and stated: *“We remain of the opinion that any amendments to our website at this stage would not be in the best interests of our customers, especially given that these updates would place important elements of the product in an unregulated environment.”*
150. On 12 January 2021 the leading counsel instructed by the Commission, having reviewed the written advice of leading counsel instructed by BetIndex, provided further advice that he maintained his original view that the buying and selling of BetIndex Shares fell within Article 85 of the RAO. He noted that, based on his advice, he considered that leading counsel for BetIndex might not have been shown the Football Index game rules relating to instant sells.
151. On 19 January 2021 the Commission shared with the FCA under common interest privilege all the legal advice it had received from the leading counsel whom the Commission had instructed.
152. On 20 January 2021 a meeting took place between the respective Commission and FCA legal teams. There was some discussion as to whether the mechanism for buying and selling on the Football Index site had changed, and whether that might explain the different view taken by BetIndex’s legal counsel with respect to that aspect of the product. Both parties agreed to consider the matter further.
153. On 27 January 2021 the Commission’s leading counsel repeated his view, following the discussions at the meeting, that both regulators had responsibilities to regulate the BetIndex product. He expressed the view that *“This is something which might need to be looked at in the current review of gambling, since it is not a particularly convenient result.”*
154. On 9 February 2021 the FCA GCD sent an email to the Commission under common interest privilege seeking an update on the Commission’s thinking.

155. On 10 February 2021 the Commission’s Legal Department contacted the FCA’s Legal Department under common interest privilege expressing the Commission’s provisional view that Article 85 FSMA was in play. The email noted that there appeared to have been some changes to the Football Index product over time:

“It appears that at one point in time, they did have an ‘Instant Sell’ function which provided a floor for all player shares, to allow traders to sell that back to the operator...It now appears BetIndex still have an instant sell function, but in a slightly different form...”

D. Suspension of Licence on 11 March 2021

156. On 5 March 2021 BetIndex gave its customers and the Commission 30 days’ notice of a cut in the amount of Dividends to be paid out – the change was thus due to come into effect on 4 April 2021. The notification to the Commission stated: *“We are continuing to experience challenging trading conditions, highlighted in our quarterly return for Q4 2020. A business recovery plan has been agreed by the Board as offering reasonable success in our ability to “trade out” of this period...A key part of this recovery plan is the reduction of Dividends payments...”*

157. On 8 March 2021 BetIndex advised the Commission of a plan to self-suspend with a view to restructuring and relaunching. The company’s senior management met with the Commission at 3pm and explained that:

- a. The company was operating in extremely challenging trading conditions.
- b. A decision had been made in August 2020 to increase the Dividends paid out (which had been £1 million per month) in order to increase the trading volume on the platform, a change which came into effect in September 2020 and was announced to be in place until May 2021 for the football season. Users had been unhappy with an initial increase of 30%, so the company had altered the increase to 100%, at a cost of £2 million per calendar month.
- c. However, it became clear that the increase in Dividend payments had not brought in additional business. This was due to both a lack of new customers and reduced activity from those on the platform. BetIndex had ceased advertising during the lockdown, which was the initial cause of the difficulty in acquiring new customers,

but the onboarding of new customers had never regained its pre-pandemic rate. In January 2020 the company had onboarded 20,000 new customers in a single calendar month, but the figures had been a tenth of that since the crisis began. Steps to manage the capital available to the company by cutting costs and directors' salaries, reducing the workforce, advertising clawback and negotiating relief in relation to office space had been insufficient. The company was therefore in the unsustainable position of paying out higher Dividends without additional money coming into the platform, and looked likely to proceed with some form of voluntary arrangement.

- d. BetIndex had taken the decision at the end of the previous week to reduce Dividends in line with its terms of service. When the Dividend reduction was implemented the amount paid would be £550,000 per month, a drop of 45% from the levels paid in August.
- e. All funds went into a player protected account protected by a trust. BetIndex currently owed customers £3.8 million, but there was £6 million in the account. Open bet stakes were £128 million – those Shares were currently worth around £20 million according to the Football Index website.

158. At 17:08 the Commission's legal team contacted the FCA's legal team to enquire whether there had been any update in the FCA's position. The email informed the FCA that BetIndex had taken the step to inform their consumers they would be decreasing the level of Dividends paid out as part of their Share offering. This had, in turn, led to a sudden decrease in Share price. The email stated that *"I thought I would draw to your attention in the event this was considered relevant to the FCA's position."*

159. At 17:31 the FCA replied to state that it had had a number of discussions internally, with another scheduled for the next day which *"I am hoping will result in us reaching a 'final view'".*

160. On 10 March 2021 BetIndex wrote to the Commission to provide information requested by the Commission. The letter confirmed that, as of midnight, £3,434,446.36 was owed to players for cash balances. It also stated that it held medium protection of customer funds in accordance with licence condition 4.1.2 and the Commission's "Customer funds:

segregation, disclosure to customers and reporting requirements: Insolvency ratings system and advice note for operators March 2019”.

161. On 9 March 2021 a Commission employee summarised BetIndex’s financial position in an internal email as follows:

1. *The business model relies on bringing new customers and churn of monies into the platform.*
2. *As a result of Covid, and subsequent voluntary commitments to cease advertising in line with BGC membership, monthly on-boarding of new customers decreased to just 10% of pre-Covid levels.*
3. *To try to stimulate activity they increased dividends from 1m to 2m in and around August. This coincided with the start of the new season.*
4. *This action failed, resulting in planned changes that will see dividends drop to 550k per month from April – a reduction of 45% from August levels*
5. *Other costs were reduced prior to this – such as 40% of workforce removed, M and A budget slashed and refunds achieved to some pre-existing advertisement commitments (advertisers were able to sell on commitments), reference made to reductions in remaining salaries, office costs...*
6. *Open bets stand at c. £128m*
7. *Monies deposited in customer accounts stand at 3.85m – protected at GC level of medium*
8. *Some activity on platform since market update of the 5 March. Reference made to c. 500k of deposits (likely to be from existing, rather than new customers) and c. 250k of share ‘trades’ on Mon 9 March.*
9. *Shares are not currently being offered in new players. Share issuance is paused in terms of offering new shares in existing players on the index although a small amount of legacy offers from them are available on the platform. Only 9.58 (Nine pounds, 58 pence) had been spent on these on Mon 9 March*
10. *Based on bullets 8 and 9, it is clear that some activity is on-going on the platform. We didn’t explore the nature of that activity in any detail but I would suggest its likely to be existing customers either trying to exit positions and/or take advantage of low prices in the expectation that the market will stabilise and recover. I would suggest that existing customers should be fully aware of the risk involved given the market updates available from the licensee and volume of traffic on social media which is a key component of the offer, much more so than you would see for sportsbook offer. A small risk exists that new customers could be signed up and stake bets whilst the business is under this financial pressure. Are we satisfied that is acceptable?*
11. *They referenced the desire to explore a CVA but stated 75% of creditors would need to agree to it. It was unclear to me whether customers were considered to be a creditor – I think this is something we need to better understand along with their intentions re treatment of open bets if they exit the market.*
12. *Its not immediately clear how they plan to trade out of the current situation. Bar the same amount of legacy offers within the system (bullet 9) they are not generating revenue through issuing new shares. Any commissions generated through trades will be absorbed by the need to pay dividends. We have a somewhat perfect storm, that has been exacerbated by COVID, whereby*

its hard to imagine how they can trade out of the position. How will they attract new customers? How will they encourage existing customers to place new bets at a time when dividends are being slashed? We need to understand their financials better.

162. At 11:16am on 11 March 2021 BetIndex sent an email to the Commission attaching a letter addressed to the Jersey Gambling Commission indicating that BetIndex would be entering into administration.

163. Later that day, BetIndex's Chief Compliance Officer confirmed in a telephone call with the Commission that BetIndex intended to self-suspend on that date. However, the company would be unable to allow customers to withdraw customer funds, as a clause in the Deed of Trust for customer funds defined customer funds as including "...any crystallised but as yet unpaid loyalty or other bonuses in respect of any customer, in each case, irrespective of whether the Company and the customer are party to any Bet." That definition would include the Dividends continuing to accrue to players on a daily basis. BetIndex indicated that it did not have sufficient funds to cover customer funds as described in the Deed of Trust. The company had received legal advice in relation to the clause that there was a risk of personal liability to the directors if they caused the company, as trustee under the amounts in the client bank account, to allow monies to be paid away from the client bank account at a time when there was a risk that loss could potentially be caused to a certain category of customers, and that another category of customers could receive more than their pro rata entitlement from the client bank account.

164. At 17:00 the Commission's Legal Department emailed the FCA's GCD stating:

The Commission has been extensively engaging with BetIndex this week due to their recent changes in dividend payout. The Commission now has serious concerns with the Licensee's financial circumstances, as they have indicated they are experiencing financial difficulties (which they admit led to the dividend change). We also have concerns over customer funds, and the ability of customers to access these. BetIndex have now indicated they will be temporarily withdrawing facilities today.

Due to the above, the Commission has taken the decision to suspend BetIndex's operating licence.

165. At 17:04 BetIndex formally informed the Commission of its intention to restrict customer access to account funds.

166. At 17:15 the FCA GCD emailed the Commission stating: *“we have tentatively come to the view that the instant sell and the media dividend elements of the product are likely to fall under Article 85, but there may be an argument that the match day element does not. We do not, however, have a definitive view and are considering seeking Counsel advice in relation to the issue and interpretation of Article 85 more broadly.”*
167. At 18:07 BetIndex’s Chief Compliance Officer emailed the Commission to state: *“Please be aware that I have resigned from my position. I will of course remain in situ for an orderly transition, but I cannot support what the business is doing here and I find myself in an totally untenable situation.”*
168. At 18:43 the Commission responded to BetIndex stating: *“As it currently stands we cannot accept this approach with regard to customer funds not being readily accessible and is in breach of the LCCP. Unless we can be assured the risk to customers is significantly reduced and they are able to withdraw their funds, as a minimum point 1) in the trust document under customer funds, we will take immediate suspension action on the licence.”*
169. At 19:37 the Commission confirmed in a further email that *“Unless the position of the operator moves from customers not being able to withdraw funds to being able to withdraw fund following the platform suspension, then the Commission formal licence suspension will still stand...Customer protection is the priority.”*
170. At 22:05 the Commission emailed BetIndex attaching a Letter of Suspension and Notice of Suspension suspending BetIndex’s operating licence with immediate effect under sections 118(2) and 120(1)(d) of the Gambling Act 2005. The letter stated that the Commission was concerned about BetIndex’s suitability to carry on licensed activities, in particular about the risks presented by the licensee’s management of customer funds. The Notice stated that *“Officials consider the Licensee’s position is unacceptable, as the operator should not prevent customers from accessing their funds. Should the Licensee genuinely have “Medium” protection over its customer funds, we would expect these funds would be readily available and not dependent on the actions of administrators. Officials are therefore not satisfied the Licensee is suitable to carry on the licensed activities, as it appears the Licensee is not managing its affairs in the interests of consumers, in particular, in relation to the management of the customer funds held.”*

171. At the time of the suspension of the licence, the breakdown of customer funds held by BetIndex was as follows:

Country	Funds
Canada	£6,179
Great Britain	£3,100,947
Guernsey	£1,482
Ireland	£42,940
Isle of Man	£867
Jersey	£1,436
New Zealand	£2,535
Bids (i.e. bids placed but not yet matched)	£55,174
Total	£3,211,560

172. In relation to the valuation of 'Shares', as of 17 March 2021 the total Share valuation sell price displayed on the BetIndex website at the time of suspension based on the amount customers were willing to pay for a Share at that time was £18,551,397.75. That Share valuation was based on quoted buy prices of the 900 cheapest offers to sell Shares. Share valuation based on bid prices in the market (i.e. what customers had actively bid to pay for Shares) was £6,848,643.75. Share valuation based on the mid-price between the buy and sell prices was £12,700,020.75. The value of open bets based on the price paid by the customer was £124,264,610.27, noting that Share values decrease to nil at the end of the 3 year period.

173. To date during its administration BetIndex has not given up its gambling licence, which remains suspended. The formal review of BetIndex under section 116 of the Gambling Act 2005 is therefore continuing.

174. The Commission has told the Review that by 11 March 2021 it considered that suspension of BetIndex's licence was the only option for delivering the right regulatory outcome. The announcement of the change in Dividend payments on 5 March 2021 had prompted a period of significant engagement with BetIndex, and BetIndex's rapidly worsening financial situation, exacerbated in part by the loss of customer confidence in

the business, had become apparent. In its discussions with BetIndex on 11 March 2020 it became apparent to the Commission that suspension of the business would either have to take place by BetIndex doing so voluntarily, or by the Commission suspending the company's gambling licence. The Commission was also aware of abuse, including death threats, targeted at BetIndex's employees.

175. Up to this date the Commission considered that there had been no reason to believe that customers would be denied access to their unstaked funds. However, upon learning that BetIndex's proposed plan for self-suspension of trading involved refusing its customers access to their account wallets, the Commission felt that it had no choice but to suspend BetIndex's licence. The Commission felt that BetIndex's interpretation of the relevant clause of the Deed of Trust, and its refusal to amend it (which the Commission believed to be in BetIndex's control) ran contrary to the statement that customer funds enjoyed a medium level of protection, as the Commission felt that sufficient funds should have been available to cover the present scenario.
176. BetIndex's refusal to accept the Commission's regulatory position on this point led the Commission to take the decision to suspend BetIndex's licence. Suspending the licence allowed the Commission to exercise a degree of control over BetIndex's subsequent actions, in particular BetIndex's proposal at the time that the business would be reorganised and the product remarketed during the continuation of the ongoing licence review.¹⁵¹
177. The Commission submitted to the Review that it operates within a permissive regime, with a statutory duty to permit gambling within the scope of the licence issued, until such time as the licence is surrendered, suspended, ceases to have effect or is revoked. There is a "*limited toolkit*" and this specific case demonstrates its constraints. The terms of the suspension of BetIndex's licence permitted customer access to funds and the paying of balances on any customer accounts, but the Commission had no powers to compel BetIndex to allow such access.¹⁵²

¹⁵¹ GC Response to written questions from the Review.

¹⁵² GC Response to written questions from the Review.

E. The Commission's response to concerns raised by third parties

178. During the period of BetIndex's licence the Commission received or became aware of a number of complaints or criticisms of aspects of the BetIndex's conduct. The Commission's contact centre received 82 complaints about BetIndex between 11 August 2017 and 18 March 2021.
179. In 2018 a complaint was made to the ASA about BetIndex's advertising (reference number A18-436999). The ASA resolved the matter informally upon BetIndex giving an assurance that its future advertising would not imply that gambling involves skill rather than chance, and they would make the necessary changes. It is unclear whether the Commission was aware of the complaint or the ASA resolution at the time. The decision was not notified to the Commission directly.¹⁵³
180. In February 2019 queries were raised by the Football Association and ARJEL about BetIndex's business model, as detailed above. The queries prompted the Commission's request for information from BetIndex on 13 March 2019, as described at paragraph 55 above.
181. On 15 May 2019 the Commission received a request for information about BetIndex from a journalist which stated: *"We are looking into so-called sports trading firms that seem to be passing off gambling as a form of investing, glossing over the risks involved... We have also been contacted by a reader who says he has been scammed out of a £100k from this firm..."* The Commission considered the request internally, noting that Compliance were currently looking at the issue. Another internal Commission email noted that several enquiries had been received about Football Index, but there was no specific trend to them. Some had raised concern about the way the business was being run or was advertising gambling, whilst other enquiries related to the protection of player funds, withdrawal of money, trouble in confirming their identity. The sender of the email further stated that *"these are normal enquiries we receive about various operators."*
182. On 16 May 2019 a further internal Commission email noted *"Just FYI, Betindex are not small... The last return submitted (Jan-March 19) indicates they have 1,848,646 customers, of those,*

¹⁵³ GC Response to written questions from the Review.

100,000 are active. GGY was £15,493.352 for this period. Hmmm.....” Finally, an email stated: *“I think this one looks like a bit of a can of worms. I think we are progressing this in the right way through an assessment and we can make relevant decisions when we know all the facts. I think everyone gets a bit excited when we are contacted by a journalist.”*

183. On 21 August 2019 and 18 September 2019 the ASA upheld two complaints against BetIndex, as detailed at paragraph 76 above. The rulings were not notified to the Commission directly.¹⁵⁴ The breaches which formed part of the complaints to the ASA were included in the Commission’s assessment findings letter dated 1 April 2020, as described at paragraph 107 above. The rulings were referenced in an internal Commission email on 7 February 2020.

184. On 28 January 2020 the Commission received an email from the CEO of another operator, one of BetIndex’s competitors. The email raised the prospect of an *“imminent threat to customer funds and safety”*, stating that *“a significant amount of customer money is at risk as a result of this operators actions”* and made reference to the need for *“an imminent investigation and response...to safely protect their innocent customers who are being broadly misled, misinformed and encouraged to gamble irresponsibly.”* The email concluded: *“The daily increase of customer funds at risk makes this matter incredibly sensitive, serious and urgent and we have no choice but to contact you directly.”*

185. The Commission met with the operator’s representatives on 31 January 2020. At that meeting the operator provided a document entitled ‘Football Index - £100m of customer money at high risk’. The document alleged that Football Index was operating an *“exceptionally dangerous pyramid scheme under the guise of a ‘football stock market”*, and stated *“Nearly £100m of customer money is already at risk and this number is growing daily. Immediate and urgent action is required to alert and protect their users.”*

186. In summary, the document alleged that:

- a. The adoption of the term ‘stock market’ had led to unparalleled levels of irresponsible gambling behavior from tens of thousands of users misled into

¹⁵⁴ GC Response to written questions from the Review.

believing that they were investing rather than gambling, with little to no consideration that all of their money was at risk.

- b. BetIndex was at significant risk of a bank run because it assumed 80% of all user ‘investments’ as gross profit to be used and spent as the company pleased. Only a fraction of the total value of users’ positions was kept in reserve.
- c. Players’ portfolio ‘values’ were misleading because they were marked at the most recent ‘Buy’ price rather than the price at which a user could sell those Shares. The ‘sell’ price was provided only by Football Index, who made no obligation or indication [sic] of the volume they could actually sell at that price. This allowed the platform to artificially mark user portfolios higher than they actually were.
- d. The underlying mechanics of the platform resembled that of a pyramid/Ponzi scheme with a ‘bet’ on the platform only becoming profitable if the price of the player bought went up or at very least equaled a decline plus a ‘Dividend’. Player prices only moved higher as the result of users buying more of that player, so all users were wholly reliant on constant user growth to make a profit and not to lose. Should user growth stop or decline, users would quickly see the value of their positions collapse.
- e. Should user growth stop or decline the company would quickly find itself unable to pay its liabilities to users. Every time Shares were purchased the company’s liabilities increased. Such liabilities now exceeded £1 million per month, and the only way the company could afford this in the long term was through the constant sale of yet more new Shares to new users.

187. The report included various screenshots of social media activity. One user appeared to state: *“Put as much money as you can on football index. It’s worth it 100%. Much better than putting the money in a savings account.”* Another user appeared to state: *“I’ve only invested about £4k so far but totally considering using FI as my main future savings.”*

188. The Commission considered the information provided in an internal meeting on the same day. The IRF described at paragraphs 75 to 77 above was created and circulated.

Although the information provided by the operator appears to have fed into the Commission's ongoing consideration of BetIndex, the Review has not been provided with any evidence of the complaint being separately determined, or a response along those lines being provided to the operator.

189. The Commission has told the Review that a Ponzi scheme is typically an investment fraud involving existing investors being paid from funds collected from new investors, usually with a promise of high return and minimal risk. Although the Commission had concerns about the presentation and 'market element' of the BetIndex product, the life cycle of Shares was clearly limited to 3 years and there was evidence of payments to consumers through Dividends. BetIndex did not present this as a risk-free investment and, although not entirely to the Commission's satisfaction, it considered that the product was clearly presented as both a share product and a bet. The payment of Dividends was not derived primarily from new customers entering the platform. BetIndex's revenues were derived from income from customers buying Shares (less Dividends paid by BetIndex to the customer thereafter), transaction commission income from customers selling Shares to each other, and transaction commission income from BetIndex's 'market maker' account clearing down selling queues.¹⁵⁵

190. The Commission has also told the Review that with any betting licence new bets taken will be used entirely or in part to pay out existing customers, with the extent of that practice depending upon the liquidity of the business. Although the Commission considered in February and March 2020 whether BetIndex might be a Ponzi scheme, it did not consider that there was evidence to show that the undertaking was fraudulent, as it was clear that existing consumers were not making profit purely from new consumers joining the scheme. Instead, customers could make a profit either by accruing Dividends for player performance and media coverage, or by selling their player portfolios at a higher price than the one at which they were purchased. The Commission also noted that consumers were depositing in and withdrawing funds from their accounts.

191. At the time of the subsequent assessment in February 2020, the Commission noted that unstaked customer funds were held within a separate, segregated account, and that the

¹⁵⁵ GC Response to written questions from the Review.

website contained a banner stating that the product was a gambling product not an investment.

192. Further, BetIndex already held a gambling licence issued by the Jersey Gambling Commission. In the course of Betindex's application for a gambling licence in 2015, the individuals managing the company had been identified, and a business plan, game rules and terms and conditions provided. As of February 2020, the Commission had received 4-5 complaints in respect of BetIndex, which the Commission did not consider to be indicative of a pool of customers experiencing difficulty receiving payments. The subsequent difficulty which customers experienced in accessing their funds in March 2021 was solely as a result of the company's administrators' decision to freeze the accounts until they had obtained clarity in respect of the Dividend liabilities.¹⁵⁶

193. Likewise, the Commission considered that Football Index did not meet the legal definition of a pyramid scheme as set out in Regulation 3 and paragraph 14 of Schedule 1 of the Consumer Protection from Unfair Trading Regulations 2008. The explanatory notes to the Regulations provide that:

Pyramid schemes promise a financial return based on the number of people that a participant is able to recruit to enter the scheme. No new money is created in pyramid schemes. Investors who get in early take their profits from investors who join later. At some point, no new investors can be found and as a result the last investors, who are at the bottom of the pyramid, lose their money. Pyramid schemes are doomed to failure because all they do is circulate money between participants. This means that for every £1 someone makes, somebody else loses £1.

194. In contrast, the Commission noted that:

- a. BetIndex's financial return was not based on the number of people that customers (or BetIndex) were able to recruit. BetIndex derived its financial returns from introducing new Shares into the product for purchase and earning commission on Shares sold between customers. Customers' promise of financial return was reliant on purchasing a Share that would either return more Dividends than the purchase price over three years, or by the Share value increasing and the customer having

¹⁵⁶ GC Response to written questions from the Review.

the ability to sell the Share to a willing purchaser. If either of these events did not happen then the customer would not see a profitable financial return.

- b. New money was created in the portfolio by the introduction of new Shares by BetIndex. The portfolio was not capped at the initial Shares introduced and with these Shares only being churned at increasing prices.
- c. Regardless of potential limitations on a customer's ability to sell their open Shares, the Shares always retained the contractual right to potentially earn Dividends during the 3-year bet period, and BetIndex had evidenced that it held sufficient funds to cover the Dividends for the next three years. Whether the customer made a profit or loss on those bets would have been due to the purchase price they were willing to accept when entering into the bet and their estimate of the Dividends that the bet would generate over the three years.
- d. Although the BetIndex product did involve an element of monies circulating between participants, the instant sell function and introduction of new Shares into the market by BetIndex allowed BetIndex to remove monies from the market or introduce new monies.

195. Finally, in concluding that BetIndex was operating neither a Ponzi nor a pyramid scheme, the Commission noted that it had not paid any Dividends into its parent company, and all profits had been recirculated back into the business to develop the product.¹⁵⁷

196. On 6 February 2020 the Commission noted internally the total number of complaints about BetIndex since 2015, as set out at paragraph 76 above.

197. On 8 June 2020 the Commission received an email from the Independent Betting Adjudication Service (“**IBAS**”) forwarding an email from an alleged BetIndex employee raising serious concerns about the company's procedures and rules. The Review is unaware whether any steps were taken by the Commission in response.

¹⁵⁷ GC Response to written questions from the Review.

198. On 10 November 2020 the Commission received a complaint about BetIndex from a customer that the way in which the company previously portrayed the value of a purchased player gave a false impression of the footballer's price and therefore how much profit had been made, and that in order to rectify this Football Index had changed the way that orders/bids for players were processed, with the result that almost all players had dropped significantly in value. The Commission responded on 16 November 2020 stating that the information provided would be shared with relevant internal colleagues for consideration of action, as deemed appropriate, in relation to potential breaches of the licensee's conditions and codes of practice. The response stated *"We cannot provide feedback on the information you have provided in case it results in an investigation."*
199. On 23 November 2020 a journalist asked the Commission: *"Why is Football Index licensed by the GC at all, when it seems, to me at least, to be a platform for derivatives [sic] trading and so more suitable for licensing by the FCA?"* He noted that Football Index's recent reviews on Trustpilot made for interesting reading.
200. On 14 December 2020 the Commission received an email from an organization called Justice for Punters which alleged that Football Index's financial situation *"doesn't look good at all."* On 11 January 2021 the same organization sent a further email alleging that Football Index *"(their Team and friends) are ganging up on people who dare to criticise them, e.g. posting negative reviews about other betting services. This for me is further proof that something is wrong, You just wouldn't bother doing this if you were 'sound' yourselves."* The same organization sent emails on 12 and 15 February 2021 making reference to the *"deceptive nature of pricing around the bets placed by players"* and *"clear encouragement for people to put in serious amounts of money"*, alleging that BetIndex was *"breaching social responsibility and deceiving customers, e.g. you can't even value your 'portfolio'."*
201. On 15 January 2021 the IBAS provided the Commission with a summary of 20 consumer complaints in relation to Football Index, including one that removal of the 'instant sell' facility had seen the value of the complainant's portfolio collapse with an estimated £12,000 loss in the value of the Shares.
202. On 9 March 2021 an entity called Caan Berry, in what appears to have been a blog post, made an *"open complaint to and about the Gambling Commission"* that BetIndex's business

model was unsustainable and that allowing BetIndex to change payouts of a 3 year bet on 30 days' notice was unfair. The article made reference to an earlier article published in January 2021 entitled 'Is Football Index a Ponzi scheme'.

F. Conclusions in relation to the actions of the Gambling Commission

203. The Review's key findings arising from the matters considered in this chapter are that:

- a. A major aspect of the Football Index model as originally marketed, the 'go-to-market' function which allowed players to sell their Shares to other players by placing them in a 'sell queue' (also referred to as the 'cash-out' function) was not notified to the Commission as part of BetIndex's application. The Commission expects applicants to be open and transparent in their applications and to provide information in respect of all relevant aspects of the product within their application form.
- b. Although not described in BetIndex's application, the 'go-to-market' feature appears to have been part of the Football Index website which was reviewed twice by the Commission during the licensing process. The 'go-to-market' feature was not noted during these reviews and the Football Index website was therefore launched in October 2015 without any significant consideration of one of its two main features.
- c. The aspects of the Football Index product that resemble a stock market, together with the use of the language of investment and financial services in the description of those features, and any resulting potential for consumers to be confused as to whether the product was a bet or an investment, were not considered by the Commission at the licensing stage.
- d. Although it seems likely that the Commission considered whether Football Index terms and conditions were consistent with the licensing objective of fair and open gambling, the assessment at licensing took place in September 2015 before the Consumer Rights Act 2015 and licence condition 7.1.1 had come into effect.

- e. It does not appear to the Review that the Football Index terms and conditions were subjected by the Commission to detailed legal scrutiny as to their fairness prior to 2019. The website had been operating for more than 3 years and its customer base had grown substantially before this occurred.
- f. Since 2017 the Commission has operated a risk-based assessment which determines the degree and type of regulatory scrutiny an operator is placed under. Likely impact is the key component of this risk assessment, and the size and scale of the operator are the major determinants of likely impact. The novelty of a product or any particular problems it may present are not currently significant factors in the Commission's risk-based assessment.
- g. BetIndex was initially assessed as a small operator and, in line with the Commission's budget, resources and regulatory model, was not proactively monitored by the Commission other than by the review of submitted Key Events, regulatory returns and Information Security Audit reports.
- h. During the period between 2015 and early 2019 the Commission was not notified by BetIndex of the addition of an 'instant sell' function in 2016 and did not itself pick up on references to the Football Index product having changed in a March 2018 Information Security Audit report or in a letter from BetIndex dated 4 March 2018 as described at paragraph 48 above.
- i. BetIndex increasingly came to the Commission's attention as its GGY increased, but the change in business model from the one which the Commission understood that it had licensed was not noticed until BetIndex's application for a further licence in January 2019.
- j. Therefore, for the first three years of its operation the Football Index product offered a key functionality, the ability for customers to buy and sell Shares, that had not been regulated or properly appreciated by the Commission as part of the licence issued. It is this functionality, and consumers' current inability to use it to sell their Shares, that has generated much of the concern arising from the suspension of BetIndex's operating licence.

- k. From the time when the Commission first became aware of the full nature of the Football Index product in early 2019, a significant amount of time was taken whilst the Commission sought a greater understanding of what was undoubtedly a novel and (at least from the legal perspective) complex product. While detailed investigation and a cautious approach was merited, the Review considers that the nearly two years that passed between 2019 and the suspension of BetIndex's licence in March 2021 was too long.
- l. This delay was at least partly because of the Commission's ongoing discussions with the FCA concerning whether part or all of the Football Index product fell within the FCA's regulatory remit, and partly due to the Commission working within the resource constraints of the lockdown imposed in response to the Covid-19 pandemic.
- m. None the less, the Commission continued to regulate the Football Index product for an extended period despite having formed the view that parts of the product did not fall within its remit. The Commission has told the Review that it considered it better to seek to obtain some protection for consumers via FCA regulation if this were possible.
- n. From May 2019 onwards the Commission's regulation of BetIndex's operations became more proactive and there were compliance assessments in May 2019 and February 2020 which identified many of the concerns which are examined in this Review, including those relating to AML and SR. The Commission's letter dated 1 April 2020 required BetIndex to take steps to ensure that its product and its presentation to consumers, and the terms and conditions associated with the product, did not contravene licence condition 7.1.1. This resulted in BetIndex revising the Football Index website to make clear that the product was a betting product.
- o. The compliance assessments were escalated to a full licence review in May 2020. This included issues such as whether BetIndex's terms and conditions were fair within the meaning of the Consumer Rights Act 2015 and compliant with AML

and SR requirements. While important issues were identified and considered by the Commission, this did not result in any decisive action until March 2021.

- p. Having only become fully aware of the issues raised by the Football Index product from 2019 onwards, the Commission was then faced with the dilemma that any drastic regulatory action it might take, such as a suspension of BetIndex's gambling licence, risked creating panic amongst consumers and a possible collapse of the Football Index platform.
- q. When it did occur, the Commission's decision to suspend BetIndex's licence was reactive rather than proactive, a result of the financial situation of which BetIndex made the Commission aware in March 2021.
- r. While the operational model of the proposed licensee is considered during the licensing process, the Commission's focus is on ensuring that the operator is clear concerning the degree of protection (high, medium or no protection) that will be put in place in respect of customer's unstaked funds. The Commission viewed funds used to purchase Shares in Football Index as staked funds that were entirely at risk.
- s. The Commission's consideration of the operational model of an operator does not extend to the regulation of the business overall. As stated in the Commission's policy statement, the Commission is not concerned with assessing the overall viability of any gambling business. The Commission does not therefore ask itself, when assessing an application for a licence, whether a business such as BetIndex was bound to fail.
- t. While the extent to which the Commission investigated and acted on information which it received about BetIndex from third parties is sometimes unclear on the materials provided to the Review, BetIndex was already under scrutiny by the Commission at the time the complaints were received in relation to the issues raised by those complaints.

BetIndex Report Chapter 6 - The Actions of the Financial Conduct Authority

Introduction

1. This chapter contains the Review's account of the relevant actions taken by the FCA in relation to BetIndex. It deals with:
 - A. The circumstances in which the FCA was contacted by the Commission and the FCA's initial consideration of the regulatory position of BetIndex.
 - B. The FCA's subsequent actions in relation to the regulation of BetIndex until BetIndex's licence was suspended on 11 March 2021.
 - C. The FCA's concluded position in relation to regulation of BetIndex.
 - D. The Review's conclusions as to the actions of the FCA.
2. This chapter gives an account of the actions that were taken by the FCA based on the sources discussed in chapter 9. Questions of what else the FCA could or should have done or whether the FCA should have taken different steps are considered in chapter 8 of the Report which considers areas for improvement and recommendations.
3. The Terms of Reference of the Review require the Review to consider both the actions of the Commission and the FCA. Chapter 5 considers the relevant actions of the Commission and these include the Commission's interactions with the FCA. In this chapter the Review focuses on the FCA's relevant activities. There is therefore a degree of overlap in relation to the account of some of the relevant events. We have also identified some points about which the accounts of the Commission and the FCA differ.
 - A. The FCA's initial consideration of the regulatory position of BetIndex**
4. The framework under which the FCA regulates the UK's financial services and markets is set out in chapter 4 of this report.

(1) BetIndex's previous interaction with the FSA

5. Although not within the time frame covered by the Review's Terms of Reference, it should be noted that on 29 September 2011 the FCA's predecessor the Financial Services Authority ("FSA") had received a request for individual guidance pursuant to SUP Rule 9.2 from a firm of solicitors in relation to Football Index's predecessor game 'FameIndex', described as *"a trading platform enabling Fametraders to take a position on the future fame of celebrities."*
6. The proposal was for 'FamePledges' to be issued in about 500 celebrity 'Names' to be traded between players on the platform (as mentioned in chapter 4 at paragraph 4.a). with the prices reflecting demand *"based on the anticipated future fame of the celebrity"*. The FameIndex would be divided into an A-List and a B-List, with the FameIndex *"acting as market makers for A-List celebrities to maintain liquidity within the market."* The request sought the FSA's view as to whether (a) any element of the proposal would amount to a regulated activity for the purposes of FSMA 2000 and the RAO requiring it to be authorised by the FSA; and (b) even if the proposal did not technically fall within the scope of any regulated activity, the FSA would still wish to regulate the business, *"given that the proposal would appear to fall within the thrust and spirit of the legislation."*
7. The FSA's Customer Contact Centre responded on 11 November 2011 stating:

"On the basis that the FamePledge does not embody an obligation by anyone (issuer, holder or anyone else) to pay anything or do anything whatsoever, FamePledge is unlikely to be a regulated investment. Hence the activities of issuing them, buying and selling them or providing a trading venue for them will not be regulated..."

They may well be property of some sort, and so one might be able to have a derivative on them (e.g. a future) but it is not clear whether this was a part of the scheme. Should you wish to receive further guidance, please set out your legal analysis as to where you believe the FamePledge scheme should fit within regulation, setting out which regulated activities or investments may be relevant, so we can consider your analysis further.

The provisions of the legislation are complex. It is a matter for you to advise your client as you see fit.”

8. The Review is not aware of further relevant contact with the FSA but, as set out in paragraph 5.a of chapter 5, an application for a licence was made by Fame Ventures to the Commission in September 2014 in respect of the operation of the FameIndex product.

(2) Initial contact from the Commission

9. As set out in paragraphs 63 and 64 of chapter 5, on 29 May 2019 the FCA’s Intelligence Department of its Enforcement and Market Oversight division was contacted by telephone and email by the Commission’s Legal Department in relation to the Football Index website. This followed the compliance assessment of BetIndex carried out by the Commission on 9 May 2019 and described in paragraph 59 of chapter 5.
10. The Commission’s email stated that the website allowed customers to buy and sell virtual ‘Shares’ in real life footballers, and to make money through ‘Dividends’ which were payments based on the performance of the footballer in the media and in matches. It noted that although the website was licensed by the Commission, the company also held a licence with the Jersey Financial Services, and queried whether BetIndex should also be regulated by the FCA. The email sought to know whether the FCA had considered this or similar arrangements before and what the FCA’s position on such an arrangement was. The Commission sought the FCA’s views on whether the arrangement would be more accurately classified as spread betting under section 10 of the Gambling Act 2005, or some other regulated activity under section 22 of FSMA. The recipient of the email within the FCA was on annual leave between 30 May and 3 June 2019.¹⁵⁸
11. As to the process adopted by the FCA in response to queries such as the raised by the Commission in May 2019, the FCA has told the Review that where it is informed that a firm is conducting activity that should be regulated by the FCA, the matter is referred to the FCA’s Unauthorised Business Division (“**UBD**”). The UBD is part of the FCA’s Enforcement and Market Oversight Division, and its role at this stage is to consider whether further action is required. The UBD is responsible for analysing and assessing

¹⁵⁸ FCA Response to written questions from the Review.

enquiries, complaints and reports of unauthorised business from consumers, firms, enforcement agencies and other third parties. New reports alleging unauthorised activity are otherwise sent to the UBD either from the Supervision Hub (the FCA's contact centre for members of the public) or directly by members of the public via an online reporting form.¹⁵⁹

12. Reports received by the UBD are initially triaged on the same day to avoid a backlog, and those assessed as being more complex, serious or requiring further time are allocated to the UBD's Perimeter team to carry out enquiries and obtain information. Once sufficient information has been collected, the UBD determines whether to deal with the matter or refer it for investigation by one of the UBD's three investigation teams. At this point the FCA can use its full range of powers under FSMA to require information, interview subjects, seek injunctions and bring criminal, civil or insolvency proceedings. However, other than carrying out the initial triage on same day as the report is received, no specific time frames apply to the UBD's assessment of unauthorised activity reports and the times taken can vary substantially.¹⁶⁰

13. In cases where there is uncertainty as to whether a firm's activities fall within the FCA's regulatory perimeter, the matter is referred to a specialist team within the FCA General Counsel's Division ("GCD"), a separate division which deals with perimeter issues. In cases where a firm is engaged in the FCA's authorisations process, the FCA's Authorisations Division (responsible for determining applications by firms to carry out a specified activity detailed in the RAO) will typically request a legal opinion from the firm, which will then be considered by the Authorisations Division together with the FCA's GCD and Policy and Supervision divisions. The Authorisations Division may then seek an opinion from external counsel. In cases where the FCA and the firm do not agree as to whether the firm's activity falls within the RAO, the Authorisations Division would alert the UBD. Although the majority of cases referred to the UBD are resolved with firms voluntarily, in cases where a firm does not accept that its activity constitutes activity regulated by the FCA, the FCA will take enforcement action, including prosecuting offenders where the case is "*worthy of enforcement action*", supported by sufficient evidence

¹⁵⁹ FCA Response to written questions from the Review.

¹⁶⁰ FCA Response to written questions from the Review.

and with reasonable prospects of success.¹⁶¹

14. The FCA has also told the Review that there was a significant increase in the number of unauthorised activity reports which it received between 2018 and 2020, as shown in the following table:

Year	Number of reports	Enquiries opened
2018	16,542	675
2019	20,609	612
2020	31,277	1,191

15. The FCA states that for many of the most serious reports of unauthorised activity, no UK regulatory body is providing oversight and there is an imminent risk of customers losing money. At the time the UBD was engaged in investigating matters such as an alleged unlawful collective investment scheme and an alleged organised crime ring promoting mini bonds, and dedicating substantial time to the temporary permission regime relating to the registration of companies providing certain crypto-related services pursuant to the Money Laundering Directive¹⁶² (which came into force in January 2020).¹⁶³
16. As no response appears to have been received to the Commission’s email of 29 May 2019, the Commission sent a follow up email seeking an update on 6 June 2019.
17. On 10 June 2019 the FCA’s Intelligence Department forwarded the Commission’s email of 29 May 2019 to the FCA’s Wholesale & Markets Policy Department. The individual within the Wholesale & Markets Policy team had stated on a telephone call that he would speak to colleagues in the GCD Perimeter team.¹⁶⁴ The Intelligence Department then contacted the Commission’s Legal Department by email stating that *“you should shortly hear from someone within our Policy/Legal team in response to your below email.”*

¹⁶¹ FCA Response to written questions from the Review.

¹⁶² Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC.

¹⁶³ FCA Response to written questions from the Review.

¹⁶⁴ FCA Response to written questions from the Review.

18. On 18 June the Commission's Legal Department sent a further email to the FCA Intelligence Department seeking a response, as no response from the FCA Policy/Legal team had been received. The FCA Intelligence Department forwarded on the Commission's email the same day requesting a response upon the recipient's return. A response to the Intelligence Department the same day stated that the sender had asked members of the FCA's General Counsel's Division ("**GCD**") *"to analyze from a perimeter perspective as this is largely a legal rather than a policy question."*
19. On 5 July 2019 a teleconference took place between members of the Commission and the FCA. It was attended by representatives of the Licensing and Legal Divisions and another employee from the Commission and a member of the FCA's GCD. During this teleconference an initial explanation of the Football Index product was provided. The Commission agreed to consider what further information it could disclose to the FCA in order to assist the FCA's consideration as to whether the product might constitute a regulated activity. The Commission's General Counsel provided the information to the FCA's Intelligence Department on 29 July 2019, and was then passed by the FCA's Intelligence Department to its GCD.
20. On 1 August 2019 a member of the FCA's GCD drafted a response setting out the FCA's views on whether Football Index was carrying out a regulated activity, and requested that the draft be reviewed by a colleague in GCD.¹⁶⁵
21. On 2 August 2019, after reviewing the Football Index website, the FCA's GCD sent an email to its Intelligence Department, copied to the FCA's Unauthorised Business Division ("**UBD**") for its view/consideration, stating that *"It is my view that Football Index may be carrying on the regulated activity of dealing in investments as principal, with the underlying investment being an article 85 instrument."*
22. On 14 August 2019 the FCA's GCD sent a follow up email to its UBD flagging the previous email *"in case it has fallen through the cracks"*.¹⁶⁶ On 18 August 2019 the UBD responded apologising for not reverting sooner and providing the contact details of the team member allocated to look into the matter further.

¹⁶⁵ FCA Response to written questions from the Review.

¹⁶⁶ FCA Response to written questions from the Review.

23. On 22 August 2019 the UBD confirmed that it agreed with the GCD's analysis and stated:

We have previously received a consumer report (from the compliance officer of an authorised firm) and no consumer detriment is identified yet. Nevertheless, I intend to open an enquiry against Football Index due to the popularity of the platform and the potential amount of consumer money involved. It is likely that we will write out to the firm and ask the firm to clarify its business and set out why we think the firm is breaching s.19 of FSMA.

24. The GCD responded to the UBD that it would be *“Happy for you to deal liaise [sic] with Football Index in accordance with UBD usual practice...It would be helpful if you would be able to get in touch with the GC, as they are expecting our view on whether this firm is carrying on a regulated activity.”*

25. As no response from the FCA to the email of 29 July 2019 had been received, the Commission's General Counsel chased for a response by email on 30 August 2019.

26. The recipient of the email in the FCA's Intelligence Department was on annual leave until 4 September 2019.¹⁶⁷ On 12 September 2019 the Intelligence Department emailed the UBD referring to the Commission's email of 30 August 2019 and asking whether there had been *“any movement on this matter”*. The UBD response the same day was that they had not contacted the Commission because the UBD was *“still discussing the case and determining whether we would open an enquiry on this.”*

27. The FCA Intelligence Department emailed the Commission on the same day stating that the matter had been reviewed by the FCA's GCD and had now been passed to colleagues in the UBD for their consideration. The email also stated that *“I have been advised that before any matters are taken [sic] they will liaise with you and your team...they are hoping to revert back early next week.”*

28. On 19 September 2019 the FCA's Intelligence Department emailed the UBD asking whether the recipient of the email had had time to discuss the matter with his manager yet. On 20 September the UBD responded: *“Please bear with me for another day or two – it appears that it's being considered on the HoD level, let me follow up.”*

¹⁶⁷ FCA Response to written questions from the Review.

29. On 24 September 2019 the UBD emailed the FCA’s Intelligence Department stating that *“Given GCD’s advice and the status of this firm, it appears that the firm should be dual authorised. We should write to the firm setting this out and asking them to confirm that they will be looking to regularise their position.”* The sender of the email also confirmed that he would be going on secondment and would therefore not be taking the matter forward, but that he would keep the Intelligence Department updated on his successor.

30. On the same day the FCA Intelligence Department then responded to the Commission’s emails of 29 July 2019 and 30 August 2019 stating:

“our Unauthorised Business Team [UBD]...after consulting our Legal department have determined that the firm should be dual authorised. The next steps to be taken by UBD are to write to the firm setting out this and asking them to confirm that they will look to regularise their position. UBD are hoping to send the letter out in October.”

31. The FCA’s email to the Commission did not, at this stage, indicate that the FCA’s view was provisional or likely to be revisited. The position was set out more than three months after the Commission’s initial approach and was stated to be the result of consultation between the Legal and Unauthorised Business teams.

B. The FCA’s subsequent actions in relation to the regulation of BetIndex until 11 March 2021

32. Following the statement of the FCA’s position in September 2019 the Review understands that the individual within the FCA’s UBD who had been dealing with the matter then left the Department. That individual’s manager had left their role in August 2019.¹⁶⁸ The matter was passed to another member of the UBD team, who attempted to access the Football Index site on 14 November 2019.¹⁶⁹ However, the FCA did not write to BetIndex as it had indicated to the Commission that it would, and a detailed review was not undertaken until January 2020.¹⁷⁰

¹⁶⁸ FCA Response to written questions from the Review.

¹⁶⁹ FCA Response to written questions from the Review.

¹⁷⁰ FCA Response to written questions from the Review.

33. The FCA has told the Review that its UBD applies certain risk-based criteria in order to identify and prioritise those cases which are likely to result in the greatest harm to consumers. The Review has been informed that the criteria used are sensitive and so are they are not set out in the Report.
34. The FCA has told the Commission that UBD was aware that BetIndex was regulated by the UK and Jersey Gambling Commissions, and that some degree of consumer protection was therefore already being afforded to consumers. While UBD had noted in August the popularity of the platform and the potential amounts of consumer money involved, no potential detriment to consumers had been identified at that time and nor did the matter appear to trigger any of the other key priority areas set out above.¹⁷¹ Whilst a referral from another regulator was “*clearly a factor to be considered in prioritisation*”, there were a range of other important considerations such as those set out above.¹⁷²
35. On 23 January 2020 the Commission’s Licensing Division emailed the FCA Intelligence Department requesting an update on the FCA’s activity, including “*clarity with regards to which part of the product offer would/ does fall under the FCA remit.*” The email stated: “*...we are keen to ensure product offerings are regulated by relevant and appropriate bodies. Furthermore, if dual regulation/ authorisation is required, its vitally important that their terms and conditions/ rules clearly explain which elements are regulated/ authorised by whom...*”
36. On 31 January 2020 the FCA Intelligence Department contacted the UBD Perimeter team, forwarding on the Commission’s email of 23 January 2020, asking for confirmation whether BetIndex had been contacted.
37. On 5 February 2020 the UBD responded to the Intelligence Department. Notwithstanding the view set out by UBD in its 24 September 2019 email, by 5 February 2020 the UBD’s position had changed and was stated as follows:

I wanted to flag with you the fact that this may not be a case we take forward:

- *GCD has shared its view (internally) that the firm’s product may be a specified investment (Art 85 instrument) under FSMA and may therefore be of concern to UBD.*

¹⁷¹ FCA Response to written questions from the Review.

¹⁷² FCA Response to written questions from the Review.

- *However, our approach historically to sports betting indices like this is that, while these products can and do technically breach FSMA as above, UBD's approach has been to try to avoid getting involved in sports betting / gambling activity, even when there have arguably been aspects of FSMA in play. The rationale for this has generally been that consumers get involved in such schemes for entertainment rather than investment purposes.*
- *Given our very substantial work load at the moment, this would not be an area that we would now prioritise which is why our preference is to refer such cases back to the Gambling Commission or Action Fraud if there are allegations of criminality.*

38. The FCA has stated to the Review that its GCD provides *“technical advice on whether an activity falls or potentially falls within our remit and is not applying the above [risk] factors to determine whether the FCA should intervene in a particular case.”*¹⁷³

39. The FCA has told the Review that the UBD assessment of BetIndex in January 2020 involved consideration of GCD's earlier analysis, a review of the Football Index website and *“other material where BetIndex promoted its business”*, open source material concerning BetIndex and the ASA decision regarding BetIndex dated 18 September 2019. There were also discussions about *“the approach to take in this case and how that compared to UBD's historical approach to other gambling cases where there was some doubt as to whether they fell within the FCA's perimeter.”*

40. Although the Review has not been provided with any documents evidencing the assessment carried out by the UBD in January 2020, it is told by the FCA that the UBD reached its conclusions based on the Football Index website describing itself as a gambling product rather than as an investment and those elements of the language used on the website and in the terms and conditions which indicated betting rather than financial markets: for example ‘game’ rules, the placing of ‘bets’ and the opportunity of ‘winning’ payouts. Further, the FCA appears to have considered the timing of BetIndex television advertising (late in the evening when other gambling sites were also being advertised) and online postings and videos referring to BetIndex as a gambling product.

41. One of the factors which is said to have influenced the UBD decision was that it *“did not consider that there was an expectation or belief by consumers that the money placed with BetIndex was protected or that they would benefit from the independent oversight of complaints by the [FOS] or from*

¹⁷³ FCA Final Submission.

protection by the [FSCS] if the firm were to fail.”¹⁷⁴

42. On 7 February 2020 the Intelligence Department responded seeking confirmation that “...I can take from what you have stated that we didn’t write to the firm as was originally indicated to me and subsequently the GC? If that is the case then I need to inform the GC of that.”
43. On 9 February 2020 the UBD confirmed to the Intelligence Department that “*The previous case officer on this case thought they ought to write to the firm but he left shortly thereafter and when we have reviewed the case we have come to the conclusion set out in my email. I know this is not ideal...*”
44. On 10 February 2020 the Intelligence Department contacted the Commission in response to the Commission’s email of 23 January 2020 seeking a telephone call, which took place later that day. No notes of the call are available,¹⁷⁵ however in an internal email later the same day the individual within the FCA’s Intelligence Department confirmed to the UBD that they had “*appraised [the Commission] with the situation as set out in your email. [Redacted] Would like to explore this a little further...*”¹⁷⁶
45. There is some disagreement between the FCA and the Commission about what was discussed during the call, and its outcome. The FCA considers that its position was set out during the phone call, over a year before BetIndex went into administration, and that it informed the Commission of its decision that it would not take the matter forward. The Commission’s understanding is that the FCA continued to be of the view that BetIndex should be regulated by both the Commission and the FCA (though the FCA confirmed that BetIndex’s risk profile did not meet requirements for the FCA to take action against BetIndex.)
46. On 14 February 2020 a senior member of the Commission’s Licensing Division contacted the FCA Intelligence Department stating that, as the matter was now deemed complex by the Commission it had been escalated to her and other colleagues, and the Commission wanted to establish the view of the FCA in terms of decisions about where regulatory responsibilities lay. This approach is consistent with the Commission’s understanding that at the time being that the FCA had not reached a definitive view in relation to the regulatory

¹⁷⁴ FCA Response to written questions from the Review.

¹⁷⁵ FCA Response to written questions from the Review.

¹⁷⁶ FCA Response to written questions from the Review.

position.

47. On 4 March 2020 a teleconference took place between the Commission and members of the FCA’s Intelligence and UBD Departments. Prior to the teleconference, in an internal FCA email UBD stated to the Intelligence Department that:

Ultimately, this is not really about the extent to which these activities fall within scope but rather whether this is conduct we are likely to prioritise. Given that consumers affected are not looking to make investments but engage in this conduct as pleasure, it is unlikely to feature highly in our priorities in the near future.

48. The agreed actions from the meeting (as recorded by the Commission) included the Commission considering whether it held any further information which it could share to assist the FCA in its decision making / risk assessment, and the FCA reviewing and considering further whether any aspect of the BetIndex product fell within its remit. The Commission suggested that a date for a response from the FCA be provided. On 5 March 2020 the FCA’s Intelligence Department confirmed to the Commission that it would forward the action points on to the members of the UBD who had been on the call, and that the FCA would revert back once it had consulted internally.

49. The FCA has told the Review that the meeting on 4 March 2020 took place because the Commission wanted the FCA to reconsider the position it had set out on 10 February 2020. In the case of BetIndex, the information provided by the Commission did not have a material impact on the assessment reached by UBD in early 2020 (as was confirmed in a call on 8 June 2020).¹⁷⁷

50. The FCA has told the Review that starting from March 2020 the Covid-19 pandemic placed great strain on consumers, firms and markets, requiring the FCA to respond to a wide range of issues. Workplaces were closed to a majority of financial services staff, who were required to work from home with little notice.

51. One of the FCA’s key objectives was to build a “financial bridge” to support consumers, FCA-authorized firms and businesses until longer-term Government support was in place.

¹⁷⁷ FCA Final submission.

As a result, the FCA produced guidance at short notice on a range of subjects such as how firms providing credit should treat customers, compliance with regulatory requirements and use and interpretation of the Bounce Back Loan scheme. Over the following months the FCA set out its expectations on issues such as operational resilience, market trading and reporting, access to cash and financial crime, together with its position on compliance with FCA and other requirements. It also intervened in the area of business interruption insurance and gave advice on potential coronavirus scams. Other priorities for the FCA included the substantial work involved in preparing the 60,000 firms which it supervised for the UK's transition out of the EU and putting in place the necessary legal and regulatory framework, and the transition of financial services away from LIBOR. The FCA's work was carried out, as was that of the rest of the country, at a time of increased pressures on staff because of ill health, home schooling or caring responsibilities.¹⁷⁸

52. On 3 April 2020 the Commission contacted the FCA Intelligence Department by email to make the FCA aware of the legal advice which it had received that the buying of Shares aspect of the Football Index product fell within FSMA and to seek another meeting. The email stated that *“The Commission’s concern is that while the operator is currently licenced [sic] by the Commission, only a small element of the product offered by this operator falls within the remit of the Gambling Act 2005. We are concerned with the risk this poses to the consumers by that element not regulated by the Gambling Commission. It would be helpful if we could discuss this further.”*
53. On 16 April 2020 the Commission chased for a response to its email of 3 April 2020 seeking a meeting with the FCA.
54. On 28 April 2020 the FCA Intelligence Department forwarded the Commission’s email of 16 April 2020 to the UBD. In its response on the same day the UBD stated:

[The UBD] when looking at it have considered that what they [BetIndex] are doing at its core and which they intend as well as consumers understand them to do would be gambling. So whilst they remain constructed as they are they are out of scope for us.

Advice from GCD means that any need to be FCA authorised would only be required if several conditions are met and from what I have seen admittedly not a deep dive review but sufficient for myself to be satisfied indicated not all if any of them are met. Therefore, unless GCD provide fresh

¹⁷⁸ FCA Response to written questions from the Review.

advice changing their position we cannot engage them and frustratingly is one where expectations have been very poorly managed initially so can only apologise for that.

55. The FCA has told the Review that “[t]he person providing this view was not senior. He was referring to the fact that a view was provided to the Gambling Commission in September 2019 which was different to that provided in February 2020, when the FCA noted that it would not be taking forward BetIndex as a case.” Further, the FCA has stated that, whilst it “accepts that there may have been an initial and short period when the Gambling Commission may have had an expectation inconsistent with the view provided by the FCA in February 2020” the FCA notes that “for the majority of the period, and over 12 months before the firm went into administration, the Gambling Commission had a clear understanding of the FCA’s position that it would not take forward BetIndex as a case.”¹⁷⁹ As noted above, it is unclear to the Review whether the FCA’s view in February 2020 was that it would not be taking the BetIndex case forward. The email from UBD on 5 February 2020 was to the effect that “this may not be a case we take forward” (emphasis added). Certainly it would appear that the Commission does not appear to have understood that the FCA would not be taking the BetIndex case forward at all.
56. On 30 April 2020 the FCA Intelligence Department responded to the Commission’s email of 16 April 2020 stating that the FCA UBD would be in touch. The FCA confirmed that it had run searches across its systems for BetIndex and IndexLab and had not come across documents relating to the firms. The FCA stated that it was also running checks against the parent company Tradex. On the same date the FCA’s UBD had a teleconference with the Commission at which, according to the FCA, the UBD confirmed that it had reviewed the additional information provided by the Commission, but did not think it could take the matter forward because of legal uncertainty, the activity being gambling and because the Commission was best placed to carry it forward.¹⁸⁰
57. On 20 May 2020 the Commission notified BetIndex of the commencement of a formal licence review under section 116 of the Gambling Act 2005 (as set out in chapter 5 at paragraphs 115 and 116). The FCA has told the Review that it has found no evidence of the Commission informing the FCA, in May 2020 or subsequently, that it was undertaking a review of BetIndex’s gambling licence.¹⁸¹

¹⁷⁹ FCA Final Submissions.

¹⁸⁰ There are no Minutes available for this teleconference.

¹⁸¹ FCA Response to written questions from the Review.

58. On 16 July 2020 a BetIndex customer contacted the FCA’s financial promotions team raising concerns about a welcome offer. The FCA advised the customer to direct their complaint to the Gambling Commission and the Jersey Gambling Commission, as BetIndex was not regulated by the FCA.
59. On 10 August 2020 BetIndex wrote to the FCA’s General Counsel requesting individual guidance pursuant to section 139A of FSMA and SUP 9.2.6G as to whether the Shares involved in its product, or the arrangements for buying and selling the Shares involved a specified investment under FSMA. The letter attached legal and expert financial advice which BetIndex had obtained expressing the view that BetIndex was not providing a contract for differences and was therefore not subject to FSMA.
60. On the same date the FCA’s GCD forwarded BetIndex’s email to the UBD stating: *“Before I consider their request, grateful if you could let me know whether there was any further progress on this matter on your end – last time we spoke was back in February when I believe you were doing to discuss the firm with the Gambling Commission.”*
61. On 11 August 2020 the UBD responded to the GCD stating *“the matter did not reach our risk threshold and we asked the Gambling Commission to take it forward. We have not stayed in contact about this so we don’t know at what stage the case is at.”*
62. The FCA has told the Review that requests for individual guidance from (i) firms which are not regulated by the FCA, and (ii) a flexible firm (a term used by the FCA to denote a firm which, like the great majority of firms regulated by the FCA, does not have a dedicated relationship manager) are managed by the Complex Solutions Team within the FCA’s Supervision Hub (a department within the Authorisations Division). The Complex Solutions team engage members of the FCA GCD and Policy team to provide a response, though the Complex Solutions Team acts as the point of contact for the maker of the request.¹⁸²
63. On 16 September 2020 the FCA’s Supervision Hub provided BetIndex with its Individual Guidance, which stated that *“The FCA’s view is that the shares are likely to amount to a specified*

¹⁸² FCA Response to written questions from the Review.

investment under article 85 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (“RAO”). However, we note that ultimately matters relating to the perimeter are decided by the courts and not the FCA.” The response continued: “Based on the information that we have, the “share” in a player, can be viewed a [sic] single contract, with all of the potential dividends under the contract representing the profit arising under the contract.”

64. The Review notes that the FCA’s position in its response to BetIndex in September 2020 differed from the internal view, expressed by the FCA’s UBD as recently as April 2020, that the conditions necessary for BetIndex to require authorisation by the FCA were not met. This April 2020 view was itself different from the position adopted by the FCA in September 2019 that BetIndex should be dual authorised by the FCA and the Commission.
65. On 22 September 2020 the FCA received a complaint from a consumer about the Football Index website, alleging that it used the language of stocks, shares, dividends and portfolios to mis-sell as a financial product; that it had characteristics of pyramid selling, and gave a false impression of the liquidity of positions and mis-marked portfolios to the offer side. The consumer received an automated response upon submission of the complaint which stated that the FCA assessed all reports it received about potential unauthorised activity, but would only contact the consumer again if it required further information. It is not clear to the Review whether any action was taken as a result of this individual consumer complaint.
66. On 30 September 2020 a member of the Commission’s Licensing Department contacted the FCA’s UBD and Intelligence Department seeking a further meeting to discuss updates on the Commission’s current thinking about BetIndex and the issue of dual regulation. On 1 October 2020 the FCA’s Intelligence Department responded to the Commission’s email by referring the Commission to the FCA’s UBD *“given this clearly is a perimeter issue”*.
67. The Commission chased the FCA UBD for a response on 9 and 16 October 2020. The FCA UBD reverted on 26 October 2020 providing contact details of the relevant FCA team.
68. Also on 26 October 2020 the FCA received an email from a compliance consultant on behalf of BetIndex postponing a meeting with the FCA on the basis that the firm disagreed with the FCA’s individual guidance suggesting that BetIndex’s activities fell within the

perimeter and wanted to seek further legal advice before the meeting. The letter stated that *“on the one hand, they are desperate not to be perceived by any regulator as not being fully cooperative. However, they are also not convinced by the Individual Guidance provided. This contradicts both legal advice and professional advice they have received and so they are going to further consult with their lawyers.”*

69. On 5 November 2020 the Commission met with the FCA’s UBD perimeter team. The Commission informed the FCA that it had been informed by BetIndex that it had received an individual guidance note from the FCA indicating that the FCA had full remit over the product on offer. The FCA representatives noted that if an application was made for permission to be regulated by the FCA, that would involve the FCA’s Authorisations team. The FCA stated that it had been planning to engage with BetIndex regarding FCA regulation in September 2019, but that subsequently¹⁸³, due to resource and their risk profiling, this was not taken forward. The FCA also clarified that it was not definitive that the operator required dual regulation. It was agreed that the Commission would seek a copy of the guidance note. The issue of dual regulation more generally was also discussed. The Commission noted that Football Index was quickly approaching top 10 of GGY.
70. On 6 November 2020 a member of the Commission’s Enforcement team contacted the member of the FCA’s Supervision Hub who had issued the Individual Guidance to BetIndex dated 16 September 2020, seeking to understand the FCA’s processes and asking whether the FCA was in the process of licensing the Football Index product or was awaiting an application.
71. On 10 November 2020 in a call between the Commission’s Enforcement Division and the FCA Supervision Hub, the FCA repeated its view that the product should be regulated by the FCA. The FCA advised the Commission that the application process for FCA regulation, including responses from BetIndex and the possibility of the need for a wider FCA review, might take between 6 months and a year to process.
72. On 18 November 2020 BetIndex’s solicitors wrote to the FCA to notify them that it had received oral advice from leading counsel that he did not consider the Football Index product to fall within Article 85 of the RAO such that it should be regulated by the FCA,

¹⁸³ The Minutes of the meeting record that this occurred in June 2020. The FCA has advised the Review that it considers that the reference in the minutes should be to February 2020.

that written advice to that effect was expected by the end of November and to request that the FCA review its Individual Guidance upon being provided with the written advice.

73. On 4 December 2020 the Commission sought a call with the FCA *“to discuss BetIndex in particular, but also the regulatory approach to these products more generally.”*

74. On 14 December 2020 the Commission’s General Counsel contacted the FCA General Counsel seeking to arrange a lawyer to lawyer discussion to reach *“a mutually agreed position moving forward about where these products sit within each of our regulatory frameworks.”* The email stated: *“I am contacting you directly because we consider that the consequences of a determination that BetIndex’s product is regulated by the FCA, rather than the Commission, will have material consequences for BetIndex. Unfortunately this gives rise to a strong probability of litigation against the Commission and the FCA by BetIndex in order to protect their position, particularly as they have already indicated they wish to remain regulated by the Commission.”*

75. The FCA’s General Counsel responded by email on 15 December 2020 explaining the position reached by the FCA in September 2020 and stating:

“The guidance provided to BetIndex is, of course, only the FCA’s view of the matter and, ultimately, the view taken by the Courts may differ to that of the FCA. I also acknowledge that the BetIndex product is not one falling within the traditional financial services, and that the position we take may have policy implications for both the Gambling Commission and the FCA, as well as the UK gambling industry.”

76. On 17 December 2020 BetIndex’s solicitors provided the FCA with a copy of their leading counsel’s written advice and requested the FCA to review its Individual Guidance dated 16 September 2020.

77. On 19 January 2021 the Commission shared with the FCA all the legal advice it had received from the leading counsel whom the Commission had instructed.

78. At this time members of the FCA’s GCD continued to discuss whether they considered that the BetIndex product was an Article 85 investment so that it fell to be regulated, in whole or in part, by the FCA. Concerns were raised as to whether the FCA would wish to regulate such a product if that were a matter of discretion for the FCA.

79. On 20 January 2021 a meeting took place between the respective Commission and FCA legal teams. There was some discussion as to whether the mechanism for buying and selling on the Football Index site had changed, and whether that might explain the different view taken by BetIndex’s legal counsel with respect to that aspect of the product. Both parties agreed to consider the matter further. The FCA has told the Review that it considered that particularly those aspects relating to the buying and selling of ‘Shares’ in footballers needed to be explored further, and that the information which it requested from the Commission following the meeting was not received until 10 February 2021.¹⁸⁴
80. On the same day the FCA GCD noted that the BetIndex product was one of a number that the Commission were aware of in which different elements of the product might fall within Commission or FCA regulatory obligations, with the betting element falling to be regulated by the Commission and the CFD element potentially falling to be regulated by the FCA. Again the question of whether the FCA would want to have regulatory responsibility for sports and other non-financial spread bets was raised.
81. On 9 February 2021 the FCA GCD sent an email to the Commission under common interest privilege seeking an update on the Commission’s thinking. The next day the Commission’s Legal Department contacted the FCA’s Legal Department under common interest privilege expressing the Commission’s view, which was stated to be provisional, that Article 85 FSMA was in play. The email noted that there appeared to have been some changes to the Football Index product over time:

“It appears that at one point in time, they did have an ‘Instant Sell’ function which provided a floor for all player shares, to allow traders to sell that back to the operator...It now appears BetIndex still have an instant sell function, but in a slightly different form...”

82. On 8 March 2021 at 17:08 the Commission’s legal team contacted the FCA’s legal team to enquire whether there had been any update in the FCA’s position. The email informed the FCA that BetIndex had taken the step to inform their consumers that they would be decreasing the level of Dividends paid out as part of their Share offering. This had, in turn, led to a sudden decrease in Share price. The FCA has told the Review that, based on its

¹⁸⁴ FCA Response to written questions from the Review.

own internal review, the FCA believes that this was the first indication that it was given by the Commission that there might be some financial pressures on BetIndex.¹⁸⁵ The FCA has told the Review that it is likely that the FCA would have regarded such information as highly relevant to the priority and urgency with which any concerns relating to BetIndex would have been treated.¹⁸⁶ The FCA has told the Review that as a general principle, a firm that is in financial difficulty can present an increased risk to consumers' funds. As a result, such cases tend to be escalated to senior management. Furthermore, for such cases, work is undertaken and decisions are made on an expedited [sic] basis.¹⁸⁷

83. The Review understands from the FCA's response that the BetIndex matter was not escalated to senior FCA management or work undertaken and decisions made on an expedited basis. The FCA has confirmed that the individuals within UBD who worked on BetIndex were not members of the Senior Leadership Team ("SLT"),¹⁸⁸ although the FCA's General Counsel was aware of the issue because BetIndex sent its request for individual guidance to him, as was another member of GCD's SLT.¹⁸⁹

84. At 17:31 the FCA replied to the Commission's 17:08 email stating that it had had a number of discussions internally, with another scheduled for the next day which "*I am hoping will result in us reaching a 'final view'*".

85. On 11 March 2021 at 17:00 the Commission's Legal Department emailed the FCA's GCD stating:

The Commission has been extensively engaging with BetIndex this week due to their recent changes in dividend payout. The Commission now has serious concerns with the Licensee's financial circumstances, as they have indicated they are experiencing financial difficulties (which they admit led to the dividend change). We also have concerns over customer funds, and the ability of customers to access these. BetIndex have now indicated they will be temporarily withdrawing facilities today.

Due to the above, the Commission has taken the decision to suspend BetIndex's operating licence.

¹⁸⁵ Though the Review notes that the suspension of football matches for a period in 2020 was publicly available information and the FCA was aware that BetIndex's business model was based on football.

¹⁸⁶ FCA Response to written questions from the Review.

¹⁸⁷ FCA Response to written questions from the Review.

¹⁸⁸ Defined as Head of Department or above.

¹⁸⁹ FCA Final submissions.

86. At 17:15 the FCA GCD emailed the Commission stating: *“we have tentatively come to the view that the instant sell and the media dividend elements of the product are likely to fall under Article 85, but there may be an argument that the match day element does not. We do not, however, have a definitive view and are considering seeking Counsel advice [sic] in relation to the issue and interpretation of Article 85 more broadly.”*

87. In the event, the FCA did not obtain advice from leading counsel in relation to BetIndex’s product until some weeks after BetIndex’s gambling licence had been suspended. The FCA has told the Review that the opinion which BetIndex obtained from leading counsel presented *“compelling arguments...against the Gambling Commission’s position even before the FCA commissioned Counsel.”*¹⁹⁰ But it is apparent to the Review that the legal advice which BetIndex obtained from leading counsel, which was first notified to the FCA on 18 November 2020 and provided to the FCA in writing on 17 December 2020, conflicted directly with the FCA’s own advice to BetIndex in its Individual Guidance issued on 16 September 2020. In those circumstances, it is not clear to the Review why the FCA waited a further 3 months before taking the decision to seek legal advice from its own leading counsel. Whilst the FCA has stated that it wanted to be in a position to give its counsel as complete a picture as possible about the changes to the Football Index product over time, its eventual decision to seek advice after the suspension of BetIndex’s licence was clearly too late to contribute to a resolution of the regulatory responsibilities issue in a way that would assist consumers.

88. The Commission suspended BetIndex’s licence with immediate effect at 22:05 on 11 March 2021.

C. FCA’s concluded position in relation to the regulation of BetIndex Limited product

89. While the FCA described its position before the suspension of BetIndex’s licence as a tentative view that some or all of the BetIndex product fell under the FCA’s regulatory jurisdiction, the FCA has subsequently reached a concluded view that no part of BetIndex’s product falls within the FCA’s remit on legal grounds. The FCA also considers that no part of the BetIndex product should fall to be regulated by the FCA on policy grounds.

¹⁹⁰ FCA Response to written questions from the Review.

90. The FCA’s concluded view was reached after having obtained and considered opinion from leading counsel. This concluded view was not reached, however, until some weeks after the suspension of BetIndex’s gambling licence on 11 March 2021.
91. The Review’s Terms of Reference do not extend to expressing a view as to whether the Football Index product, or any part of it, fell within the regulatory remit of the Commission or the FCA or both. The FCA has told the Review that applying the regulatory perimeter analysis to the Football Index product was not straightforward, due partly to *“the ambiguity in the drafting of Article 85 RAO”* and certain case law which the FCA believes *“made it difficult to apply a clear and logically consistent set of criteria to determine whether a contractual right was one falling within Article 85 without interpreting the provision widely, and potentially capturing a wide set of leisure gambling products.”*¹⁹¹
92. The Review has considered representations made by the FCA. In summary, the principal representations assert that:
- a. There was a consistent pattern of the Commission not providing the FCA with crucial pieces of information concerning possible regulatory breaches by BetIndex and intelligence received concerning BetIndex, even though the Commission was entitled to share this information with the FCA. Had the FCA received this information its risk assessment of BetIndex would have been different and this would, based on the prioritisation criteria then in place, have led to the FCA giving greater priority to addressing the regulatory position of BetIndex. The FCA argues that this would in turn have led to prompter responses by the FCA to the Commission and an earlier formulation of the FCA’s eventually concluded view that no part of the BetIndex product fell to be regulated by the FCA.
 - b. The FCA has a legal obligation to use its resources in the most efficient and economic way possible and has a discretion whether to take any enforcement action. It was therefore appropriate and permissible for the FCA to start by considering whether BetIndex was carrying on regulated activities.

¹⁹¹ FCA Response to written questions from the Review.

- c. Even if, contrary to the FCA's eventual concluded position, any of the activities of BetIndex fell within the FCA's regulatory responsibilities, the path to authorisation of such activities by the FCA would have been difficult and contentious.
 - d. If any of BetIndex's activities had been authorised by the FCA, compensation under the FSCS would not necessarily have been available. Obtaining compensation under the FSCS is a far from straightforward process that could not be delivered quickly even if BetIndex's customers had been eligible for compensation.
93. The Review has carefully considered the FCA's representations and some of the points made have been reflected in the Report. The Review none the less considers that some of representations made are speculative and/or fail to address the concerns raised in the Report.
94. The suggestion that the provision of different or further information by the Commission to the FCA would have led the FCA to act differently is inherently speculative. While it is possible that the provision of further information by the Commission to the FCA would have had an effect on the degree of priority attached to the FCA's consideration of BetIndex's regulatory status, it is necessarily unclear how far this would have had a material effect on the actions of the FCA or the timeline of events.
95. It is clear from the matters set out in chapters 5 and 6 that the FCA were aware that another regulatory body, the Commission, considered that clarifying the regulatory status of BetIndex was a matter of importance and that the Commission continued to pursue this matter with the FCA. Despite this awareness and an ability on the part of the FCA to press for more information about BetIndex if it considered this was necessary, the FCA's actions were limited to those set out in chapter 6 of the Report.
96. The Review acknowledges the competing demands on the resources of the FCA and the need for the FCA to prioritise. The Review has not suggested that it was inappropriate for the FCA to start by considering whether BetIndex was carrying on regulated activities. The Review's concern is that, albeit after significant delays, the FCA adopted differing and contradictory positions on this issue. Having concluded at various times that some or all

of BetIndex's activities fell within its regulatory remit, it none the less did not take any effective action.

97. While it may be the case, as the FCA suggests, that the FCA is not able to take action in respect of each and every possible instance of regulated activities taking place without authorisation, BetIndex was, by the time of the FCA's involvement, an operator with a GGY of almost £40m and was a case that had been brought to the FCA by the Commission as a matter of concern.
98. The Review accepts that, had BetIndex applied for authorisation by the FCA in respect of any or all of its activities, it would have been required to undergo all stages of the authorisation process and that this process may have taken significant time if issues arose or litigation had resulted. How long the process would have taken and what the result would have been is necessarily speculative. The FCA's policy is to decide on a complete application within 6 months and an incomplete application within 12 months. However long the process may have taken does not affect the cogency of the observations made in the Report about the FCA's behaviour.
99. The Review has not commented on the likelihood of compensation being available to BetIndex customers in the event that any or all of BetIndex's activities fell within the FCA's regulatory responsibilities.

D. The Review's conclusions as to the actions of the FCA

100. The Review's key findings arising from the matters considered in this chapter are that:
 - a. The FCA's consideration of BetIndex's regulatory position continued, with some intervals, for two years. During this period there were a number of delays in the FCA providing responses to the Commission. The FCA's suggestion that, had it been provided with more information by the Commission, it would have acted quicker and reached an earlier final determination of its position, is necessarily speculative.

- b. During the period between May 2019 and mid 2021 the FCA has held and/or expressed to the Commission and BetIndex different and inconsistent positions about whether any or all elements of the BetIndex product fell or was likely to fall within its regulatory remit.
- c. After the Commission made an initial request for the FCA's view with regard to regulation of the Football Index product on 29 May 2019, the FCA did not provide a substantive response until 24 September 2019, at which point it stated to the Commission that the FCA's view was that the product should be dual-regulated.
- d. The FCA's UBD then reached the view more than 4 months later that BetIndex "*may not be a case we take forward*" despite advice that it may fall within the FCA's regulatory perimeter. That conclusion appears to have been determined, at least in part, by policy considerations as to the extent to which the FCA considers that betting products should come within its perimeter. The UBD did not initially communicate that decision either to the Commission or to the FCA's Intelligence Department.
- e. According to the FCA, its view that the FCA would not take action in relation to the regulation of BetIndex was communicated to the Commission in a telephone call on 10 February 2020. The Commission, however, does not appear to have understood the FCA to be stating definitively that it would not regulate part of the product, as the Commission continued to seek meetings to discuss dual regulation of BetIndex over the following year until the company's licence was suspended.
- f. On 16 September 2020 the FCA issued BetIndex with Individual Guidance which stated that the FCA's view was that the whole BetIndex product was likely to fall within the FCA's remit. That Individual Guidance prompted BetIndex's request for a review because it did not accord with the conclusions reached by either the Commission (that the product should probably be dual-regulated) or BetIndex's own legal advisors (that the product should be regulated solely by the Commission) or, apparently, the FCA's previous position (that the product should be dual-regulated).

- g. In the face of the need to consider the regulatory position of an undoubtedly novel product, the legal interpretation of which was nuanced and open to different conclusions, the FCA did not obtain external legal advice from leading counsel until after BetIndex's gambling licence had been suspended.
- h. The FCA's decision making around the question of where regulatory responsibility for BetIndex fell was influenced by its view that the Football Index product was understood by consumers to be a gambling product rather than an investment. Responses following the suspension of BetIndex's licence suggest that this was not the case for at least some of BetIndex's customers and it is not clear to the Review how far the FCA gave detailed consideration to the effect on consumer understanding of the extensive use of the language of finance and investments in connection with the Football Index product.
- i. The FCA's approach to deciding whether to take further action in relation to the regulation of BetIndex appears, at times at least, to have been led by its assessment of relative priorities in light of the resources available rather than by a legal analysis of whether the BetIndex product fell within the legal ambit of FCA's regulatory responsibility: *"Ultimately, this is not really about the extent to which these activities fall within scope but rather whether this is conduct we are likely to prioritise"*.
- j. The FCA's approach in relation to taking further actions was also influenced by its awareness that BetIndex was being regulated by the Commission. However, the fact that the Commission was acting as regulator did not provide an answer to the question of whether any or all of BetIndex's activities fell within the regulatory responsibility of the FCA.

BetIndex Report Chapter 7 - Regulatory Co-operation

1. This chapter considers:
 - a. The degree to which the Gambling Commission and other regulatory bodies work together in relation to licensed gambling operators offering novel products: and
 - b. Whether better working between regulatory bodies can be facilitated in future.
2. While the bulk of the materials provided to the Review focuses on the regulation of BetIndex, the Review has been provided with information relating to the other aspects of the interaction between the Commission and the FCA concerning other products.

A. Gambling Commission co-operation with other regulators in licensing novel gambling products

3. As also noted in chapter 3, the Commission states that since 2015 it has seen significant shifts in the gambling market reflecting wider technological and consumer trends in society, in particular a shift to online gambling. The same period has seen an increase in the complexity of the business models and products of the businesses regulated by the Commission, with the lines between betting and other types of products becoming increasingly blurred.¹⁹² The FCA has also had to adapt to regulating novel and complex financial products, such as its new responsibility for regulating crypto asset firms' compliance with AML legislation since January 2020.
4. The joint regulation of what the Commission has referred to as "*blurring on the lines* [sic] *between gambling and financial services*" necessarily involves co-operation and exchange of information between the different regulators. The statutory powers which the Commission and the FCA have to share information, including with each other, are set out in chapter 3.
5. Prior to the issues with BetIndex, the regulation of binary options trading had led to what the Commission has called "*challenges in the current statutory systems of regulation.*" As a result discussions between the Commission, the FCA and HM Treasury took place and in March 2015 the

¹⁹² GC Introduction to Responses to written questions from the Review.

Treasury commenced a formal consultation entitled ‘Transposition of the Markets in Financial Instruments Directive II’ which included binary options.¹⁹³ Binary options are financial products where an investor bets on whether an event will occur or not, such as the value of a share, currency, commodity or index rising or falling over a given time period. The outcome of the bet, in terms of the cash or percentage gain, is predetermined, and if an investor is correct, they receive a fixed pay-out and if they are incorrect, they lose their stake.

6. Historically, binary options were considered to be gambling products and, therefore, UK firms which provided binary options were licenced by the Commission. However, the Commission’s regulatory perimeter did not capture firms which ‘passported’ into the UK from the European Economic Area (“**EEA**”) as a result of the Markets in Financial Instruments Directive II¹⁹⁴ (“**MiFID II**”). Further, the Commission considered that binary options, despite meeting the statutory definition of betting, presented similar risks to financial derivatives and required the additional controls afforded by financial rather than gambling regulation. In particular, the Commission considered that classifying binary options as financial instruments would ensure that providers would be subject to specific regulatory requirements in relation to, among other things, organisational and capital requirements. The Commission also considered that treating binary options as financial instruments would allow a range of investor protection rules in MiFiD II to be applied.
7. The Commission has emphasised to the Review that its remit is the regulation of a discretionary leisure activity, with a duty to permit gambling in accordance with the licensing objectives, and that its regulatory powers are not as great as those of the FCA.
8. Following the consultation, the issue of the regulation of binary options was resolved by ministers through legislation as part of the transposition into UK domestic law of MiFID II. Binary options sold by both UK and EEA firms were brought within the scope of FCA regulation from 3 January 2018.¹⁹⁵ The FCA subsequently prohibited the sale of binary options

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/418281/PU_1750_MiFID_II_26.03.15.pdf

¹⁹⁴ Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU.

¹⁹⁵

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/814673/RPC-4371_1_-HMT-FCA_-_product_intervention_measures_for_retail_binary_options_-_IA_f_opinion.pdf

to retail customers altogether in April 2019.¹⁹⁶

9. In addition to the issue of binary options, discussions have taken place between the Commission and the FCA in relation to the regulation of spread betting. Spread betting falls outside the definition of a 'bet' for the purposes of the Gambling Act 2005 by virtue of section 10(1) of that Act, section 22 of FSMA and Articles 73 and 85 of the RAO. The FCA has told the Review that in 2015, as part of the discussions relating to the regulation of binary options, it also raised the appropriateness of sports spread betting being within the FCA's perimeter.
10. The FCA's position was at the time, and remains today, that sports spread betting is a gambling activity undertaken for leisure purposes which does not fit naturally within the FCA's remit for consumer protection of investment activity within the financial services sector. The FCA has recently reopened this discussion with the Commission at senior level, in the hope that the Gambling Act review will afford an opportunity for legislation to be altered, such that sports spread betting would clearly fall within the Commission's regulatory remit.¹⁹⁷
11. The FCA has told the Review that there are currently only two firms which are 'dual-regulated' by both the FCA and the Commission. Both firms were incorporated and authorised within the perimeter of the FSA, but applied to the Commission for regulation of their fixed-odds betting activities when the Commission was established on 1 September 2007. According to the FCA, dual regulation of these firms does not appear to have created any issues for the relevant regulators.¹⁹⁸
12. While the Review considers that there are examples of the Commission and the FCA working well together in relation to the regulation of some products, this was not the case in relation to their dealings with each other in respect of BetIndex, as is set out in detail in chapters 5 and 6.
13. In the case of BetIndex, the Commission first contacted the FCA Intelligence Department on 29 May 2019, almost two years before BetIndex went into administration. The Review considers that the level of effective co-operation between the FCA and the Commission during this period was clearly insufficient. While the Review considers that materials presented to it

¹⁹⁶ GC Response to written questions from the Review.

¹⁹⁷ FCA Response to written questions from the Review.

¹⁹⁸ FCA Response to written questions from the Review.

demonstrate that both the Commission and the FCA identified that the Football Index product was a novel product which gave rise to the challenging issues as to the proper regulatory regime to be applied to it, the communications and co-operation between the Commission and the FCA did not rise to meeting these challenges.

14. During most of this period, the Commission appears to the Review to have been chasing the FCA for one response after another, with frequent delays in receiving responses from the FCA. Although the FCA has told the Review that a referral from another regulator was “*clearly a factor to be considered in prioritisation*” (see chapter 6 of this Report), that factor appears to have been afforded less weight than the FCA’s internal policy considerations as to whether or not it wished to regulate gambling products such as Football Index. As discussed in chapter 6, the FCA considers that, had the Commission given it more information about the Commission’s own concerns in relation to BetIndex’s business model and management, this would have resulted in the FCA according a higher degree of priority to its consideration of BetIndex’s regulatory position. This submission is necessarily speculative.
15. Despite taking part in a call with the Commission on 5 July 2019, the FCA took until 24 September 2019 to inform the Commission of its decision that BetIndex should be dual authorised and that the FCA’s UBD would write to BetIndex. Subsequently, the FCA failed to write to BetIndex and failed to inform the Commission of that fact until, at the earliest, 10 February 2020, after it had again been chased by the Commission for a response and almost 9 months after the Commission first sought the FCA’s views on the matter.
16. As discussed in chapters 5 and 6, it is unclear to the Review what the FCA told the Commission that its position was during that call, because no notes of the call appear to have been taken by either regulator. Further, the Review understands that the FCA did not take notes of the subsequent meetings with the Commission on 4 March 2020, 30 April 2020; 5 November 2020; 10 November 2020 or 20 January 2021.
17. The Review recognises the additional demands on both regulators’ resources as a result of the COVID-19 pandemic, but the Review considers that the issue of regulatory responsibility was not given sufficient priority either before or following the outbreak of the pandemic. Whilst the Review recognises that the FCA is now of the opinion that the Football Index product would not fall within its regulatory remit, throughout the material time between September 2019 and May 2021 (when advice from leading counsel was obtained), the FCA had expressed

the view to both the Commission and BetIndex that from a legal perspective Football Index fell, was likely to fall or may fall partly or entirely within the FCA's regulatory perimeter.

18. It appears to the Review that the lack of progress in resolving the regulatory responsibility issues with the FCA led the Commission to write to BetIndex in the terms that it did on 16 July 2020, requiring BetIndex to contact the FCA regarding the activities which the Commission considered fell under the FCA's remit, and to take the necessary steps to become compliant with the regulatory regime under FSMA.
19. In relation to questions of prioritisation, the FCA has told the Review that it has found no evidence of the Commission informing the FCA, in May 2020 or subsequently, that it was undertaking a review of BetIndex's gambling licence.¹⁹⁹ The FCA has also told the Review that, based on its own internal review, the FCA believes that the Commission's email dated 8 March 2021 was the first indication that the FCA was given by the Commission that there might be some financial pressures on BetIndex.
20. The FCA has told the Review that it is likely that the FCA would have regarded such information as highly relevant to the priority and urgency with which any concerns relating to BetIndex would have been treated.²⁰⁰ The Review has not seen any evidence that the Commission did notify the FCA of the licence review in May 2020, or raise concerns about financial pressures on BetIndex prior to March 2021.
21. The Review also considers that the Commission's continuing inability to resolve the regulatory responsibility issue meant that this issue remained the focus of many of the Commission's activities in relation to BetIndex over a prolonged period.

B. Whether better working between regulatory bodies can be facilitated in the future

22. Partially in light of the issues that have arisen in relation to the regulation of BetIndex, the Commission and the FCA have signed a Memorandum of Understanding ("MOU") dated 23 June 2021 which establishes a framework for cooperation, coordination and information sharing between them. The MOU has been agreed between the FCA and Commission without

¹⁹⁹ FCA Response to written questions from the Review.

²⁰⁰ FCA Response to written questions from the Review.

input from the Review. The MOU sets out broad principles for collaboration and the legal framework governing the sharing of relevant information and intelligence. The MOU notes that it is a statement of intent and does not give rise to legally binding obligations on the part of either the Commission or the FCA (“**the Parties**”).

23. Paragraph 13 of the MOU states that the Parties recognise that there are areas where their remits may overlap, or it may not be clear who is best placed to lead on an issue that arises. The Parties will therefore discuss such matters to ensure that, the appropriate regulator(s) can be identified. Paragraph 14 provides that to the extent permitted by law and having regard to their respective powers, expertise and resources, the Parties seek to ensure that

- a. *They notify each other of significant developments, including on matters of authorisation or licensing, where the other is likely to have an interest and to discuss, where appropriate, any steps they propose to take.*
- b. *There are designated points of contact through which issues may be quickly and efficiently raised and disseminated to the relevant areas at the other.*
- c. *Matters arising will be dealt with in as timely a manner as possible and in a way that allows for the proper exchange of views to take place.*
- d. *Where a decision is called for, they will endeavour to determine a mutually agreed position at working level in the first instance. If this is not possible, the named points of contact will escalate the issue to an Executive Director at the Commission or an Executive Director at the FCA to ensure that a decision is reached in a timely manner.*

24. By paragraph 15, *“The Parties may refer a matter for action to the other if the other is considered to be more appropriate to deal with the matter. Where the recipient determines not to proceed, an explanation will be provided in writing.”*

25. Paragraph 17 provides that the Parties will exchange information on relevant issues of interest to the extent permitted by law, and as relevant to the performance of their respective functions. Paragraph 18 states that they may do so proactively or on request from each other in writing. Each may suggest a reasonable deadline for response, including an explanation of any urgency. Paragraph 20 provides that *“On general policy matters relating to areas of mutual interest, for example, financial promotions of contract for differences (CFDs) and other high risk retail derivatives, the Parties will consult each other at an early stage in relation to policy deliberations which may have a material effect on the other’s objectives.”*

26. Paragraph 36 of the MOU provides for named points of contact to meet quarterly to discuss any matters arising since the last meeting and to check if the discussion and resolution processes set out in the MOU are working effectively. The Parties will monitor the operation of the MOU and review it annually. Finally, the MOU specifies email addresses within each regulator to serve as a means of contact for the other regulator.
27. The Review considers that agreeing the MOU was an appropriate and proactive step by the Commission and the FCA to address the issues that had arisen in relation to BetIndex. The MOU contains many useful provisions and adequately addresses some of the concerns that have been identified by the Review in considering the actions of the Commission and the FCA in chapters 5 and 6.
28. Although the MOU is likely to prove useful, the Review considers that in its current terms it does not adequately address all of the Review's areas of concern. Most importantly, the MOU provides no mechanism for resolving disputes between the Commission and the FCA about the extent of their regulatory responsibilities. While paragraph 14 provides a mechanism for escalating disputes to Executive Director level at the Commission and FCA respectively, it is silent about what happens in the event that a dispute remains unresolved. As set out in chapters 5 and 6, there was a degree of escalation within the Commission and the FCA in relation to BetIndex but this did not result in a resolution of the dispute as to regulatory responsibilities.
29. The Review considers that without an appropriate dispute resolution mechanism it is not possible to be confident that the impasse that occurred between the Commission and the FCA in relation to regulatory responsibility for BetIndex would not occur in the future. The Review therefore considers that agreeing and reflecting in the MOU an effective mechanism for resolving disputes about regulatory responsibility should be a high priority.
30. As to the appropriate form of dispute resolution mechanism, there are a number of approaches that could be adopted. The MOU could provide that in the event of a dispute about regulatory responsibility the matter would be referred to HM Treasury and DCMS respectively. Alternatively, the parties could agree to jointly refer the issue to leading counsel or other appropriate person for determination. In some cases, legal proceedings which also involve any third party affected by the decision may be appropriate.

31. While the precise form of the appropriate dispute resolution mechanism should be discussed between the Commission and the FCA, the Review considers it important that some appropriate mechanism is promptly agreed upon and then implemented to reduce the risk of a repetition of the stalemate that occurred in respect of BetIndex.
32. Another aspect of the MOU that the Review considers is currently insufficient is in relation to the mechanisms for ensuring sufficiently prompt decision making. The MOU provides for matters to be dealt with “in as timely a manner as possible” but the Review considers that this is insufficient. The MOU should include a default timetable for the discussion of issues at working level followed by escalation and, if necessary dispute resolution. While there may be cases where it is appropriate for the Commission and the FCA to agree limited extensions to the default timetable, the expectation should be that the timetable will apply in general and the ability to extend it should be limited. The Review considers that unless a default timetable for these steps is included within the MOU there is a real risk that the delays and stalemate that characterised the position in relation to BetIndex could be repeated in similar circumstances in the future.
33. As the Review has set out in chapters 5 and 6, it has received different accounts from the FCA and the Commission of events that took place and of each party’s understanding of the position and future actions to be taken by the other. In investigating these issues, the Review has been hampered by the surprising absence of written notes of some relevant discussions. Some important communications were carried out by telephone which were not followed up in writing. Other important communications were carried out in email exchanges that did not seek to clearly capture the respective positions of the parties or clearly spell out next steps. Where minutes of discussions were prepared they were sometimes not shared with the other organisation and thus did not represent an agreed outcome.
34. The Review considers that it is important that the MOU should therefore include provisions for the proper written recording of the outcome of discussions that take place between the Commission and the FCA in relation to matters of regulatory responsibility. Each written record of the relevant discussion should be circulated for agreement to allow both parties (and all those not present at the relevant discussions) to clearly understand the current position and action points.

35. The Review appreciates that the Commission and the FCA, and the individuals working within them, have many responsibilities and that ensuring prioritisation of the resolution of regulatory responsibility issues may be difficult. This may be particularly so as there may be a tendency among individuals in each organisation to try to ensure that the other body takes on the relevant responsibility, thereby reducing their own burden.
36. While it may not be appropriate for inclusion in the MOU, the Review also considers that it may assist effective communication and prioritisation of issues if the achievement of the MOU objectives are considered as part of the appraisal process of staff with relevant responsibilities. Knowing that work to achieve the MOU's objectives would be considered in the appraisal context may incentivise giving these issues their proper priority.

BetIndex Report Chapter 8 - Areas for Improvement and Recommendations

1. This chapter sets out the Review's conclusions and recommendations. It considers:
 - a. What could have been done differently or better by the Commission and the FCA to better deliver their statutory duties.
 - b. Recommendations for improvement.
 - c. Consideration of the possible effect of different regulatory actions.

2. In addressing these issues it is important to consider the benefits and dangers of hindsight. In chapter 3²⁰¹ the Review considers the resources available to both the Commission and the FCA. Both regulatory bodies operate in demanding environments with limited resources and they are necessarily required to make difficult decisions about how to approach and prioritise their workloads. In addition, the nature of the activities regulated by the Commission has changed significantly over the period considered in the Review, with online gambling becoming far more establishing as a regulated gambling activity. The Covid-19 pandemic commenced during the period under review and has presented both regulators with additional organisational and operational challenges.

3. In contrast, the Review has had the benefit of considering the relevant events over time and with knowledge of what eventually occurred. The following sections of this Report should be read with these considerations clearly in mind.

A. Better or Different Regulatory actions

4. The regulatory actions of the Commission and the Review's conclusions in respect of them are set out in chapter 5. In light of those conclusions the Review considers that the following better or different regulatory actions could have been taken by the Commission:
 - a. Although the 'go-to-market' function which gave customers the ability to trade Shares was not contained in the business model or game rules submitted with BetIndex's licence application in July 2015, the Commission's pre-licensing review of the Football

²⁰¹ Paragraphs 37 to 40 and 58.

Index website could have identified the mismatch between the product described and the licence applied for. The trading function had been notified by way of a Key Event earlier in the same year, when an application in relation to the same product had been made by BetIndex's parent company Fame Ventures,²⁰² and this would have been another way in which the Commission could have identified the discrepancy.

- b. Similarly, although the Commission was not notified by BetIndex of the addition of the 'instant sell' function in 2016, the Commission could have picked up on references to significant changes in the BetIndex product when it reviewed an Information Security Audit report in relation to BetIndex in July 2018 or the letter from BetIndex dated 4 March 2018 described at paragraph 48 of chapter 5.
- c. At licensing and subsequently, the Commission could have given scrutiny to the likely effect on consumer understanding of the Football Index product of the use of the language of investments and the financial markets in describing the products. The question of whether using the language of investment would lead some customers to consider that they were purchasing an investment does not appear to have been sufficiently considered, although in April and May 2020 the Commission did ensure that warnings that Football Index was a gambling product be given greater prominence on the Football Index website.²⁰³
- d. Also at licensing the Commission could have given greater scrutiny to the question of whether BetIndex's contractual terms were consistent with the licensing objective of fair and open gambling and, subsequently, with the statutory fairness requirement contained in the Consumer Rights Act 2015.
- e. The Commission could have taken a stricter approach to BetIndex's failure to seek a licence that matched the terms upon which it was to operate the Football Index product. When the Commission discovered the significant discrepancy between the nature of the product described in the licence and the product operated there appear to have been no immediate regulatory consequences for BetIndex Limited (although the Review notes that the Commission's review of BetIndex's licence has not yet

²⁰² Although the Review notes that the application by Fame Ventures and the application by BetIndex were handled by different members of the Commission's Licensing Division.

²⁰³ See paragraphs 107 to 109 and 115 of chapter 5.

concluded).

- f. The Commission could have chosen to prioritise novel and complex products in its approach to allocating the degree of scrutiny to be applied to operators. Had BetIndex been prioritised for scrutiny before it built a large customer trading base and a large GGY, the Commission would have been able to take more expansive regulatory actions in relation to BetIndex without the same degree of concern about the extent of impact of the regulatory actions on customers.
 - g. Once the Commission became fully appraised of the actual nature of the product operated by BetIndex and the regulatory responsibility issues presented by them, it appropriately raised those issues with the FCA. However the engagement with the FCA was left to drift for too long. It should have been apparent much earlier to the Commission that engagement with the FCA was not leading to a resolution and the matter should therefore have been escalated to the highest levels within both organisations and, if necessary, to the relevant government oversight departments to assist with resolution of the impasse as to regulatory responsibilities.
5. The regulatory actions of the FCA and the Review's conclusions in respect of them are set out in chapter 6. In light of those conclusions the Review considers that the following better or different regulatory actions could have been taken by the FCA:
- a. Prompter decision making. As set out in chapter 6, there were a number of occasions when parts of the FCA took extended periods to reach a decision on regulatory responsibility issues and communicate that decision to the Commission. Earlier decision making by the FCA would have been of great assistance to the Commission in understanding the FCA's position.
 - b. Consistent decision making across the different departments within the FCA. Chapter 6 details the different positions adopted by different parts of the FCA at different times in relation to the regulatory responsibilities issue. While the Review accepts that the Football Index product gave rise to issues of legal difficulty and complexity, the desirability of the FCA reaching an earlier, definitive and consistent position on the regulatory responsibilities issue is clear.

- c. Better co-operation with the Commission. As discussed in chapter 7, co-operation between the FCA and the Commission could have been improved, something appropriately recognised by the FCA in its work with the Commission on the agreement of the MOU.

B. Recommendations for improvement

6. Recommendations for the improvement of regulatory co-operation between the Commission and the FCA are dealt with in chapter 7 of the Report and are not repeated in this part of the Report.
7. As far as other areas in which recommendations for improvement can be made, the Review considers that in the case of the Commission these relate to the follow areas:
 - a. Prioritisation of novel products
 - b. Greater focus on fairness of terms at the licensing stage
 - c. Consideration of the effect of the language of investment and the financial markets on consumer understanding of gambling products
 - d. Greater licensing and continuing scrutiny of divergences between described and actual features of a product
 - e. Prompter decision making and action
 - f. Recognition of the need for internal escalation
 - g. Consideration of a different approach to customer funds in relation to long-term, tradeable products
8. Dealing with each of these points in turn, the Review has described in chapter 5²⁰⁴ the approach taken to allocating the degree of regulatory scrutiny to operators. Although there is a clear logic to giving an increased scrutiny to larger operators, the Review considers that the case of BetIndex illustrates that there is also a strong case for giving enhanced scrutiny to novel products. A large yield operator who operates familiar products which clearly fit into the existing regulatory framework may well pose less risk to the achievement of the statutory licensing objectives than a novel product which gives rise to complex issues both concerning

²⁰⁴ Paragraphs 11 to 15 and 24.

the regulatory framework of the product and in relation to how the product is going to be understood by consumers.

9. The Review considers that there was an insufficiently detailed examination prior to February 2020 of whether BetIndex's terms and conditions were both fair and open and fair within the meaning of Consumer Rights Act 2015.²⁰⁵ It appears to the Review that, particularly in the case of novel, unfamiliar products, the question of whether terms are fair should not be limited to a consideration of whether the rights of the operator are clearly articulated in the terms and conditions. The fairness of the terms is likely to be influenced by the consumer's understanding of the nature of the product. Terms that may be considered fair in the context of a commonly understood gambling product may require a different consideration in a product that is not unambiguously presented as a gambling product.
10. Linked to the recommendation above is the associated recommendation that enhanced consideration be given in the licensing and regulatory scrutiny process to the effect that the use of the language of investment and the financial markets may have on consumer understanding of gambling products. The Review did not find materials suggesting that this issue received detailed consideration in the context of BetIndex. It is considered that the potential for consumer confusion, and therefore a failure to achieve the Commission's Statement of Principles objective of protecting consumers and the wider public, clearly exists in relation to the use of such language. If the aim is for consumers to appreciate that a gambling product is a gambling product then the use of the language of gambling, rather than the use of the language of investment, is a clear signpost to the actual nature of the product. The FCA has submitted to the Review that the use of investment terminology by gambling operators "serves only to increase potential consumer confusion that these products are investments subject to financial regulation".
11. The Review has noted above the apparent lack of regulatory action taken in respect of BetIndex arising from the discrepancy between the product described in the licence application and the product offered to the public. Given the volume of applications that the Commission

²⁰⁵ The Review notes that the Consumer Rights Act 2015 had not come into force at the time that BetIndex's licence application was assessed. However, its predecessor the Unfair Terms in Consumer Contracts Regulations 1999 also provided for an assessment of fairness of the terms of consumer contracts which were not individually negotiated. In any event, the Review assumes that the Commission was aware in September 2015 that the Consumer Rights Act 2015 would be coming into force on 1 October 2015.

has to consider, the need for applications to properly describe the product is clear. This is particularly the case where the operator is unlikely to be subject to proactive post-licensing regulatory scrutiny. The Review considers that a significant difference between the terms of the licence applied for and the product operated should be considered by the Commission to be a significant failure to work with it an open and co-operative way, and dealt with accordingly. The existence of such a difference should also be recognised as a potential warning sign that an operator may require closer regulatory scrutiny.

12. The Review considers that earlier action by the Commission in relation to the matters set out above would have increased the scope of the Commission's regulatory actions. These may have reduced or avoided the Commission's dilemma, described in chapter 5, that taking effective regulatory action in respect of a much larger operator gives rise to a greater risk of loss of funds on the part of the very consumers that the Commission is trying to protect.
13. Linked to the need for prompter regulatory action is the need for a recognition that early internal escalation of unresolved problems is necessary to achieve effective regulation. As observed in chapters 5 and 7, the regulatory responsibility issue remained unresolved for an extended period and the Review considers that earlier and greater escalation of the issue may have assisted in speeding up the process that remained unconcluded at the time BetIndex went into administration.
14. The Review understands that in relation to most operators the Commission seeks to ensure its consumer protection objective by making sure that the operator has a clear statement about the degree of protection given to unstaked customer funds. It is understood that this is on the basis that in most gambling scenarios, staked funds are recognised by consumers to be at risk, albeit that the Commission seeks to satisfy itself in general terms that the operator is of good financial standing. The Review recommends that consideration is given by the Commission to the question of whether this approach, which may be generally appropriate, is also the correct approach in relation to long term, tradeable bets (such as those offered by Football Index) or whether appropriate additional levels of liquidity on the part of the operator should be required reflecting some of the value of staked funds.
15. As far as the FCA is concerned, the Review has identified three areas where better or different regulatory action could have been taken. The requirement for better co-operation with the Commission has been identified and addressed in chapter 7. As far as the need for prompter

and more consistent decision making is concerned, the Review considers that it is difficult to make more specific recommendations in relation to how these objectives are to be achieved internally within the FCA. The FCA has detailed knowledge of its own operational and accountability structures and accordingly the Review recommends that the FCA is asked to set out how it will seek to achieve quicker and more consistent decision making in these circumstances.

16. All of the recommendations set out above are likely to have resource implications. The manner in which the Commission is funded is described in chapter 3. The availability of sufficient resources to enable the recommendations made in this Report to be implemented is not within the Terms of Reference of the Review. It is a matter that is likely to fall within the current review of the Gambling Act 2005 and the Review would ask that this be considered.
17. As far as the review of the Gambling Act 2005 is concerned, the regulatory responsibilities dispute described in detail in chapters 5 and 6 of the Report suggests that the boundaries between the regulatory competences of the relevant regulatory regimes may be an appropriate matter for consideration in that review.
18. Other than in that respect, none of the parties the Review has engaged with has identified any specific shortcomings in the powers available under the current legislation, beyond the need to consider whether the provisions of the Gambling Act 2005 need to be updated to reflect the issues created by the shift to online gambling since the 2005 Act came into force.

C. Consideration of the possible effect of different regulatory actions

19. The Terms of Reference ask the Review to consider whether different regulatory actions could have prevented the Football Index product from being offered in the form that it was or could have avoided the collapse of the product and related losses suffered by BetIndex's customers.
20. The consideration of these issues is necessarily speculative. In addition, it appears to the Review that in order to provide as full responses to these issues as possible, documentation and information from a range of additional sources outside of the scope of a regulatory review, including from BetIndex itself, would be required. Further, as far as avoiding the administration of BetIndex is concerned, input from other areas of expertise, including forensic accountancy, would also be required. In the absence of this information the Review

considers that it can only offer incomplete responses to these questions. The Review is also conscious that it is expressly not seeking to address or determine any question of legal liability and these questions touch on matters that may be the subject matter of litigation.

21. The views expressed below are therefore subject to the considerations as set out in paragraph 20 above and the disclaimer set out in chapter 1.C of this Report.

(1) Preventing the product being offered in the form that it was

22. The short answer to the question of whether regulatory action could have prevented the Football Index product being offered to the consumer in the form that it was is that the regulatory action of granting a licence to BetIndex was, in fact, in respect of a differently constituted product that did not include the Share trading function. This key aspect of the Football Index platform was not authorised by the Commission's grant of a licence to BetIndex in 2015. Had the Commission noted and properly considered the Share trading function prior to the licence being granted, it is possible that the product might not have been offered in the form that it was.

23. In addition, once the Commission had appreciated the Share trading aspect of the Football Index product, the Commission could have carried out a detailed consideration of the fairness of BetIndex's terms and conditions, including its use of language. If the Commission had done so it is the Review's understanding that the Commission had sufficient powers, under its ability to impose licence conditions, to have required BetIndex to avoid using language in respect of the product that was likely to confuse consumers or lead consumers to be confused as to whether the product was actually a gambling product rather than an investment. The exercise of these powers would be likely to have increased clarity concerning the true nature of the product that was offered by BetIndex, although they would not have changed its underlying nature.

(2) Preventing the collapse of the Football Index platform and/or preventing customer losses

24. For the reasons set out in paragraph 20 above, the Review does not consider that it is in a position to state whether different regulatory action on the part of the Commission or the FCA would have prevented Football Index entering administration and Football Index customers suffering losses.

25. The events leading up to the administration of Football Index are set out in detail in chapter 5 and it is clear that immediate precipitants of the administration included the suspension of football during the early stages of the Covid-19 pandemic, BetIndex's response to those events and the behaviour of BetIndex's customers thereafter.
26. Beyond the short term circumstances of BetIndex's administration there are a range of relevant factors which include regulatory actions or lack of actions. By way of example, one of the reasons why it is not possible for the Review to reach any conclusions on why different regulatory approaches would have prevented the administration of Football Index, is that a relevant factor is the impact of decisions taken by Football Index itself both before and during the pandemic. If, for instance, Football Index had grown more slowly, spent less on advertising, paid less in Dividends etc it may be that it would have been in a different financial position at the time the pandemic occurred and may have been able to respond to it in such a way as to avoid administration. This is not an issue on which the Review has sufficient materials or the relevant expert assistance to offer a view.
27. While the Review is not in a position to state whether different regulatory action would have prevented BetIndex's entry into administration, the Review does consider it likely that earlier regulatory action by the Commission may have had an effect on BetIndex's customer numbers.
28. A theme of some of the materials the Review has been provided with is that some BetIndex customers considered that the Shares they purchased were investments to be considered alongside company issued shares or even savings accounts. If earlier regulatory action had been effective in requiring BetIndex to emphasise from the outset that its Shares were a leisure bet rather than an investment and that, in most cases the Shares would produce a negative return, it seems likely that at least some of BetIndex customers would have decided not to purchase Shares or to have spent less on them.
29. The other way in which different regulatory action might have prevented or reduced the losses of BetIndex's customers would be if BetIndex had applied for and obtained authorisation from the FCA in respect of some or all aspects of the Football Index product. This may have afforded BetIndex customers recourse to the Financial Services Compensation Scheme. For the reasons set out earlier in the Report, the Review does not express a view on the legal question of whether the Football Index product or any part of it properly fell within the FCA's

regulatory responsibility. Similarly, the Review does not express a view on whether, in the event that any or all aspects of the Football Index product were authorised by the FCA, BetIndex customers would have been able to successfully bring claims under the Financial Services Compensation Scheme.

BetIndex Report Chapter 9 - Methodology and Thanks

A. Methodology

1. This Report has been produced under significant time constraints: Malcolm Sheehan QC was appointed on 2 June 2021, had initial meetings with the Commission and FCA on 14 June 2021 and produced the first draft of this Report for DCMS on 2 August 2021 and the final report on 13 September 2021. During that time the Review has considered approximately 4,500 pages of documents. Following an initial provision of documents by the Commission and the FCA in early June 2021, the FCA provided further documents, including submissions, on 2 July 2021.
2. On 2 July 2021 the Review requested further documents and raised written questions of the Commission, which responded on 12 July 2021 with further documents and submissions. The Review also conducted an interview with the Commission by videoconference on 22 July 2021, before receiving further documents and responses to questions from the Commission on 26 July 2021. The Review raised two more written questions of the Commission on 28 July 2021, which were answered by the Commission the same day.
3. On 5 July 2021 the Review requested a number of further documents and raised written questions to the FCA. The FCA provided further documents and written responses to the Review's questions on 13, 14 and 15 July 2021. On 23 July 2021 the Commission asked more follow up questions of the FCA, to which responses and further documents were provided by the FCA on 27 July 2021. Further submissions were received from the Commission and the FCA on 20 August 2021 following the provision of sections of the draft Report for the Commission and the FCA to enable them to make pre-publication representations in respect of criticisms contained within the Report.
4. The Review was contacted and offered assistance on 10 June 2021 by TIG²⁰⁶ Consult Limited ("TIG Consult"), and on 16 June 2021 by Leigh Day, who act on behalf of a number of BetIndex's former customers in relation to possible legal action. On 28 June 2021 the Review responded to both parties indicating that it would be happy to receive materials relevant to the Review's Terms of Reference, though noting that the review was directed to a consideration

²⁰⁶ The Review understands that "TIG" stands for "This is Gambling".

of the actions taken by the relevant regulatory bodies and did not include a review into the actions of BetIndex. TIG Consult provided documents to the Review on 1 July 2021, and Leigh Day provided submissions by a further letter dated 9 July 2021 and a bundle of documents on 12 July 2021. The Review is grateful for the assistance provided by both TIG Consult and Leigh Day.

5. Further, four members of the public contacted DCMS while the Review was in progress. Their comments have been passed on to the Review, but the Review considers that they do not fall within the Review's Terms of Reference.
6. Whilst the Review has considered all the documents provided, it has at all times borne in mind the scope of its task as defined by the Terms of Reference and the restrictions imposed by the timescale required for the Review's Report. As set out paragraphs 12 to 16 of chapter 1 of this report, the Review relates to the regulation of BetIndex and does not extend to assessing the actions undertaken by BetIndex, its directors or personnel. Further, the Terms of Reference do not include expressing a view on legal questions such as which regulator should have been responsible for regulating BetIndex, nor is it the purpose of the Review to seek to apportion blame or give views as to any legal liability arising as a result of the events set out in this Report.
7. The Review has no statutory powers and has relied on the voluntary co-operation of those it has been in contact with. The Review considers the Commission's level of co-operation with the Review's investigation to have been consistently impressive. Senior members of the Commission's Licensing and Compliance Divisions have been involved in communicating with the Review from the beginning and have demonstrated a keenness to learn lessons to improve the Commission's regulatory practice. Responses to questions and documents have been provided quickly and fully as and when requested. Documents have been presented in such a way as to provide maximum assistance to the Review.
8. The FCA has also co-operated with the Review. Its response has had a strong legal input and discussions have focussed on questions of process. Rather than initially supplying all relevant primary documents, the FCA submitted an anonymised timeline from which the Review requested documents which it was able to identify. In order to protect the identity of staff below director level from the risk of possible identification in the Report, the FCA chose to provide emails to the Review in redacted form.

9. In accordance with guidance from the Information Commissioner’s Office relating to requests for personal data about public authority employees,²⁰⁷ the Review has determined that it will not name or give the job title of employees of either regulator below the level of senior manager. The Review has reached that decision after the consideration of all of the materials provided to it so that it could be satisfied in light of the facts relevant to the Review that it was appropriate to do so in the circumstances.

B. Thanks

10. The Review wishes to thank all those who have assisted in producing this Report. It is grateful for the co-operation received from the Commission and the FCA. It is also grateful for the assistance it has received from DCMS.
11. Malcolm Sheehan QC would like to express his particular thanks to Christopher Adams for his invaluable work in assisting in the preparation of the Report.

MALCOLM SHEEHAN QC
Independent Review of the Regulation of BetIndex Limited

13 September 2021

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[https://ico.org.uk/media/for-organisations/documents/1187/section 40 requests for personal data about employees.pdf](https://ico.org.uk/media/for-organisations/documents/1187/section-40-requests-for-personal-data-about-employees.pdf)

BetIndex Report Annex 1 - Terms of Reference

Terms of Reference: Independent Review of the Regulation of BetIndex Ltd

Purpose

The purpose of this independent review is to examine the regulatory circumstances around the granting of a licence to BetIndex Limited, its subsequent suspension and the company's ultimate financial failure. It will consider the actions taken by the Gambling Commission and other regulatory bodies regarding this complex betting product. It is intended to provide an objective account of what they did, identify any lessons for them, and inform the government's Review of the Gambling Act 2005 which is considering whether changes are needed to the regulatory framework around gambling, including the Commission's powers and how it uses them. The Commission's regulatory investigation into BetIndex Ltd is continuing. This review is separate to that investigation and will be carried out and report in a way which will not compromise it.

Background

BetIndex Limited ("BetIndex") allowed customers to buy notional "shares" in footballers as a way of placing bets on their future performance and press coverage with returns taking the form of periodic "dividends" paid out according to BetIndex's formula. The Gambling Commission issued a licence to BetIndex in September 2015. In May 2019, an internal compliance assessment flagged a number of concerns, and in July 2019 the Commission contacted the Financial Conduct Authority to ask for its view on BetIndex's activities. The Commission launched a formal licence review under section 116 of the Gambling Act in May 2020 which was still in train when in March 2021 it suspended BetIndex's gambling operating licence and the company entered into administration.

Objectives

This review is intended to provide an independent expert account of what happened in this case and consider the lessons to be learnt for the future. We expect the review to report on:

1. The actions taken by the Gambling Commission in:
 - a. Licensing BetIndex, including its assessment of the company's financial circumstances as part of their suitability to hold a licence.
 - b. Monitoring changes to the product offer and ensuring the operator's compliance with the gambling licence conditions.

- c. Responding to concerns raised about the product and operator in the course of internal compliance activity and/or following interventions from third parties including customers and the Advertising Standards Authority.
 - d. Reviewing BetIndex's gambling licence from May 2020, including how it cooperated with other regulatory bodies.
 - e. Deciding to suspend BetIndex's licence in March 2021.
2. The actions taken by the Financial Conduct Authority in:
 - a. Responding to the Gambling Commission following their initial approach.
 - b. Considering whether the product amounted to a regulated activity under the Financial Services and Markets Act.
 3. The degree to which the Gambling Commission and other regulatory bodies work together in relation to licensed gambling operators offering novel products, and if better working between regulatory bodies can be facilitated in future.
 4. What, if anything, the Gambling Commission and other relevant regulatory bodies could have done differently to better deliver their statutory responsibilities and the three licensing objectives set out in the Gambling Act, and whether this could have:
 - a. Prevented the product from being offered in the form that it was.
 - b. Avoided the collapse of the product and related losses to customers.

Outputs

The independent expert should provide a report for publication by the government which seeks to answer the questions listed above. The report should provide recommendations, if required, as to changes to regulatory practice or to gambling legislation so as to provide necessary and proportionate protection for the public in relation to complex betting products.

Scope and methodology

The review will cover the period from September 2015 to 11 March 2021 when the Gambling Commission suspended BetIndex's licence. The reviewer will have access to the necessary government and regulator held information to conduct the review of their decision making and will be able to meet key individuals if desired, in accordance with any applicable legal requirements. This independent review is distinct from the ongoing regulatory action by the Gambling Commission against BetIndex's operating licence and its Personal Management Licence holders, and should not in any way undermine that process. The administration process is progressing through the courts and is also separate to this review.

Timing

The report, including any recommendations, must be submitted to the Secretary of State for Digital, Culture, Media and Sport and the Economic Secretary to the Treasury for publication in summer 2021.

BetIndex Report Annex 2 - Materials provided

A. Gambling Commission

1. The Review has been provided by the Commission with the following types of materials:
 - a. written submissions and answers to written questions;
 - b. a Commission high level organisation chart;
 - c. a timeline;
 - d. an overview of the regulatory framework;
 - e. statement of principles for licensing and regulation and policy statement on licensing, compliance and enforcement under the Gambling Act 2005;
 - f. different versions of the LCCP;
 - g. reports for the Minister;
 - h. licence application forms for BetIndex and Fame Ventures and some (but not all) accompanying documents;
 - i. BetIndex game rules and terms of use;
 - j. Key Event notifications, internal regulatory communications and other documents;
 - k. internal and external legal advice;
 - l. Minutes and notes of meetings with the FCA;
 - m. correspondence between the Commission and BetIndex, and between the Commission and third parties (such as the FCA) about BetIndex;

- n. video recordings of and documents related to compliance assessments;
- o. BetIndex submissions in relation to concerns raised by the Commission; and
- p. documents relating to complaints and queries about BetIndex raised by third parties.

B. FCA

2. The FCA has provided the Review with:

- a. written submissions;
- b. internal email correspondence about BetIndex (redacted);
- c. email correspondence with the Commission about BetIndex (redacted);
- d. internal and external legal advice relating to BetIndex;
- e. its Individual Guidance to BetIndex dated 16 September 2020;
- f. timeline;
- g. Introduction to the FCA;
- h. documents submitted to the FSA on 30 September 2011;

C. Leigh Day

3. Leigh Day has provided

- a. written submissions;
- b. Football Index documents from the website;

- c. copies of consumer complaints to the Commission and the FCA; and
- d. social media comment relating to BetIndex.

D. TIG Consult Limited

- 4. TIG Consult Limited has provided a claim form, pleadings, application notice, witness statements and correspondence relating to legal proceedings involving TIG Consult Limited, a gambling company and the Commission.

BetIndex Report Annex 3 - Glossary of Terms

Gambling Commission

AML	Anti Money Laundering
CAR	Capital Adequacy Reserve
CDD	Customer Due Diligence
CMG	Case Management Group
EDD	Enhanced Due Diligence
GGY	Gross Gambling Yield
IMG	Issue Management Group
IRF	Incident Referral Form
KYC	Know Your Customer
LCCP	Licence Conditions and Codes of Practice
SBIU	Sports Betting Intelligence Unit
SR	Social Responsibility
SRCP	Social Responsibility Code Provision

Financial Conduct Authority

FSCS	Financial Services Compensation Scheme
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FSMA	The Financial Services and Markets Act 2000
GCD	General Counsel's Division
RAO	Financial Services and Markets Act 2000 (Regulated Activities) Order 2001
SLT	Senior Leadership Team
SUP	Supervision section of the FCA Handbook
UBD	Unauthorised Business Division (part of FCA Enforcement Division)

Others

ASA	Advertising Standards Authority
ARJEL	Autorité de régulation des jeux en ligne
BCAP	Broadcast Committee of Advertising Practice
BGC	Betting & Gaming Council
CAP	Committee of Advertising Practice
IBAS	Independent Betting Adjudication Service
ISO	International Organisation for Standardisation
MiFiD	Markets in Financial Instruments Directive

BetIndex Report Annex 4 - Timeline

29.9.11	Request for individual guidance from FSA in relation to Fame500
11.11.11	FSA response
6.11.12	Fame Ventures incorporated in England & Wales
March 2015	Fame Ventures application to the Commission for a software licence and gambling licence in relation to Football Index
17.4.15	Key Event submitted by Fame Ventures notifying the Commission of improved functionality and changes to the Football Index Game Rules
17.7.15	BetIndex incorporated in Jersey
	BetIndex application to the Commission for a gambling licence in relation to Football Index
9.9.15	BetIndex granted a gambling licence by the Commission in relation to Football Index
Oct 2015	Launch of Football Index website
7.4.16	Commission advised by BetIndex of plan to increase the number of Futures available
	Football Index full marketing launch
Q3 of 2016	'Instant Sell' feature added to Football Index
2017	Football Index advertising on ITV
Q3 of 2017	BetIndex added Squad database and moved to a new structure for dividends

- 19.8.17 Commission notified by BetIndex that Dividends ‘win mechanic’ to be extended from ‘media mentions’ to include performance on the pitch
- 2018 Complaint to the ASA about BetIndex’s advertising resolved by the ASA informally
- 4.3.18 BetIndex letter to the Commission advising of a change in the product. Application not progressed due to insufficient information.
- 9.3.18 BetIndex Information Security Audit Report notes *“major changes since the last audit including an addition of 1000 plus players and changes to the games rules”* [sic]
- 31.7.18 BetIndex Information Security Audit Report reviewed by the Commission
- 22.1.19 BetIndex application for a betting intermediary licence on behalf of BetExchange Ltd
- 24.1.19 Key Event logged by BetIndex with the Commission relating to 4218 customer accounts which had not been age verified and had subsequently been suspended.
- 4.2.19 Commission rejection of betting intermediary licence application
- February 2019 Football Association and ARJEL queries to the Commission about BetIndex’s business model
- 1.3.19 Key Event submitted by BetIndex to the Commission relating to 5 active accounts for underage players which had been closed and customers refunded.
- 13.3.19 Request to BetIndex from the Commission’s Licensing Division for information about the ‘Go to Market’ option and licensable status of the activity
- The Commission’s IMG agreed that the Commission’s Compliance Division should conduct a targeted assessment of the Football Index website focussing on

AML and safer gambling controls

- 20.3.19 BetIndex response to the Commission's request for information makes clear that the 'Go to Market' had been a feature of Football Index since 2015
- 9.5.19 Commission compliance assessment of BetIndex raises concerns about AML and safer gambling and the nature of the product
- 15.5.19 Request for information about BetIndex from journalist
- 17.5.19 Commission letter to BetIndex in relation to the compliance assessment findings flags issues relating to AML, reporting of suspicious activity and social responsibility in respect of problem gambling. The letter states that the Commission is considering whether to take further regulatory action.
- 22.5.19 The Commission reviewed the BetIndex matter internally and recommended that it be escalated to the Commission's Compliance Division.
- 24.5.19 BetIndex response to the Commission's letter of 17.5.19
- 29.5.19 The Commission contacts the FCA to enquire whether BetIndex should also be regulated by the FCA.
- 5.7.19 Telephone conference between the Commission and the FCA to discuss their regulatory remit in relation to Football Index.
- 21.8.19 The Advertising Standards Agency upholds a complaint against BetIndex in relation to an advert on social media showing individuals aged under 25.
- 18.9.19 The ASA upholds a complaint against BetIndex in relation to a sponsored video on social platform which created the impression that the Football Index product was an investment opportunity when in fact it was a gambling product.

- 24.9.19 The FCA provided the Commission with a substantive response to the Commission's email of 29.5.19 stating that the FCA has determined that BetIndex should be dual authorised and that the FCA was hoping to send a letter to BetIndex in October.
- 23.1.20 The Commission chased the FCA for a response.
- 31.1.20 Commission meeting with one of BetIndex's competitors, which raises concerns that BetIndex is operating a Ponzi/pyramid scheme.
- 9.2.20 The Commission requests financial information from BetIndex including the current total value of the instant price of all outstanding bets held by customers.
- 10.2.20 FCA telephone call with the Commission. It is unclear precisely what was discussed, but the FCA appears to have clarified that it had not written to BetIndex in October 2019 and indicated that it might not be taking the BetIndex matter forward.
- 11.2.20 Commission raises internal IRF in relation to BetIndex and escalates the matter to Compliance.
- BetIndex provides a response to the Commission's request for information on 9.2.20.
- 12.2.20 An internal Commission email notes the need to avoid any actions that could have a significant negative impact on consumers' portfolio values.
- 14.2.20 The Commission contacts the FCA seeking a call to discuss the BetIndex product and the FCA's view on regulatory responsibilities.
- 19.2.20 The Commission carries out a review of the Football Index website.

- 21.2.20 Query from the Commission to the Committee of Advertising Practice in relation to a BetIndex tutorial on YouTube and podcasts showing football players under 25
- BetIndex provides information in advance of the upcoming compliance assessment.
- 25+26.2.20 Commission multi-disciplinary team full assessment of BetIndex flags concerns that the BetIndex business plan differs substantially from the one presented to the Commission on BetIndex's licence application in 2015, the company's financial position and the fact that the product is predominantly presented as a share market with less prominent mention of it being a betting activity.
- 28.2.20 BetIndex submits a Key Event notifying the commission that customer monies are now, in addition to being held in a segregated bank account, also subject to a deed of trust.
- 4.3.20 Commission teleconference with the FCA during which the FCA confirmed that BetIndex's risk profile, as currently presented, did not meet the requirements for the FCA to consider taking action against BetIndex. The parties agree to consider the matter further.
- 6.3.20 Further Commission compliance assessment of BetIndex.
- 12.3.20 BetIndex states in an email to the Commission that *"We maintain a constant level of coverage of at least 110% of total funds required to pay all cash balances."*
- 13.3.20 Football matches suspended as a result of the Covid-19 pandemic.
- 18.3.20 BetIndex suspends the 'instant sell' function on the Football Index website.
- 19.3.20 The Commission receives advice from leading counsel that the Football Index product should be regulated partly or entirely by the FCA.

- 1.4.20 The Commission provides BetIndex with its findings during the compliance assessment in February 2020, and identifies the possibility that BetIndex is unsuitable to hold a gambling licence because of a number of possible breaches of BetIndex’s licence conditions and consumer protection legislation. The Commission requests further information from BetIndex, including details of what contingency plans are in place, in light of the COVID-19 pandemic, to ensure that BetIndex remains operational.
- 3.4.20 The Commission notifies the FCA of the legal advice it has received that the FCA should regulate part of the Football Index product and states: *“We are concerned with the risk this poses to the consumers by that element not regulated by the Gambling Commission. It would be helpful if we could discuss this further.”*
- 14.4.20 BetIndex’s response to the Commission’s compliance assessment findings states again that *“We hold funds in a segregated trust protected account and maintain a margin of 110% or greater at all times.”*
- 30.4.20 FCA telephone call with GC during which the FCA confirms that it has reviewed the additional information provided by the GC but does not think that the FCA can take this forward.
- 7.5.20 BetIndex letter of response to the Commission’s findings.
- 20.5.20 The Commission launches a formal review of BetIndex’s licence.
- 8.6.20 FCA teleconference with the Commission during which the FCA confirms that it will not be taking the case forward due to its current caseload and other matters of a higher risk profile.
- The Commission receives an email from IBAS (the Betting Adjudication Service) forwarding an email from an alleged BetIndex employee raising serious concerns about their procedures/rules.
- 17.6.20 Premier league football matches resumed.

- 2.7.20 Commission Enforcement team meeting with BetIndex.
- 9.7.20 BetIndex increased dividends by around 30%.
- 16.7.20 Commission letter to BetIndex's solicitors informing BetIndex that the Commission considers the buying and selling of Shares on the Football Index website to be an activity which should be regulated by the FCA, requiring BetIndex to take appropriate steps to ensure compliance with UK law in relation to its licensable activities, including contacting the FCA and taking the necessary steps to become compliant with the FCA's regulatory regime.
- 10.8.20 BetIndex provides the Commission with a copy of legal advice provided to BetIndex advising that the Football Index product should be licensed by the Commission.
- BetIndex letter to the FCA requesting individual guidance as to whether the buying or selling of Shares on the Football Index platform amounted to specified investment under the RAO.
- August 2020 BetIndex announced that it would increase Dividend payments by around 100% with effect from 12.9.20.
- 12.9.20 Dividend payments increased.
- 16.9.20 FCA Individual Guidance provided to BetIndex stating that in the FCA's view the whole Football Index product should be regulated by the FCA.
- 22.9.20 Consumer complaint to FCA about Football Index alleges that it is a betting website which uses the language of stocks/shares/dividend/portfolios to mis-sell as a financial product; that it has characteristics of pyramid selling, and gives a false impression of the liquidity of positions and miss-marks portfolios to the offer side.

- 1.10.20 BetIndex Market Announcement that it has *“engaged with financial regulators with the objective of holding a licence that is more appropriate for our ‘market’ than our current ‘betting’ licence.”*
- 26.10.20 BetIndex postpones a meeting with the FCA because BetIndex disagrees with the FCA's Individual Guidance and wants to seek further legal advice before meeting.
- 27.10.20 Commission letter to BetIndex maintaining the Commission’s previous view that buying and selling Shares on Football Index should be regulated by the FCA and stating *“Should the Licensee fail to act to remedy this confusion, it will have no option but to consider further regulatory action.”*
- 30.10.20 BetIndex’s solicitors’ letter to the Commission notes that the FCA’s Individual Guidance takes the position that BetIndex’s product should be regulated by the FCA, a position markedly different to that adopted by both the Commission and BetIndex, and advising that BetIndex will seek advice from leading counsel.
- Meeting between the FCA and the Commission discussing their respective legal advice in relation to the regulation of BetIndex.
- 8.11.20 The Commission’s leading counsel maintains his previous view that the “Share” element of the Football Index product should be regulated by the FCA.
- 10.11.20 Commission telephone call with the FCA, which advised that the FCA was of the opinion that the Football Index product should be FCA-regulated.
- Complaint received by the Commission about BetIndex from a consumer.
- 16.11.20 Commission response to the consumer.
- 18.11.20 BetIndex letter informing the FCA of BetIndex’s leading counsel’s oral advice that the Football Index product did not fall to be regulated by the FCA, and that a full written advice would be provided in due course.

BetIndex letter informing the Commission of the above letter to the FCA, and proposing that there should be no updates to the Football Index website until certainty regarding its regulation is achieved: *“In our opinion, any changes at this stage would present a risk to consumers and, potentially, undermine the second Licensing Objective.”*

23.11.20 Journalist query to the Commission: *“why is Football Index licensed by the GC at all, when it seems, to me at least, to be a platform for derivatives trading and so more suitable for licensing by the FCA?”*

14.12.20 The Commission’s General Counsel contacts the FCA’s General Counsel in relation to the possibility of a legal to legal discussion.

The Commission receives an email from Justice for Punters alleging that Football Index’s ‘financials’ *“doesn’t look good at all”*.

17.12.20 BetIndex’s solicitors write to the FCA providing a copy of BetIndex’s leading counsel’s written advice and requesting the FCA to review its Individual Guidance of 16.9.20.

BI letter to the Commission advising the Commission of the above, and stating: *“We remain of the opinion that any amendments to our website at this stage would not be in the best interests of our customers, especially given that these updates would place important elements of the product in an unregulated environment.”*

12.1.21 Having reviewed the written advice from BetIndex’s leading counsel, the Commission’s leading counsel maintains his view that the buying and selling of Shares on Football Index is within Art 85 RAO and should be regulated by the FCA.

15.1.21 The Commission receives an email from IBAS summarising a Football Index customer complaint about BetIndex’s withdrawal of ‘In Play’ Dividends from the start of February.

- 18.1.21 The Commission receives an email from a Football Index consumer alleging that *“There is no way this product and this company are financially sound.”*
- 19.1.21 The Commission shares its legal advice in relation to BetIndex with the FCA.
- 20.1.21 Meeting between the Commission and FCA legal teams exploring dual regulation or FCA regulation of the entire product. The FCA indicate that they need to examine the matter more closely. Both parties agree to reconsider their positions.
- 12+15.2.21 The Commission receives an email from a consumer about Football Index’s alleged *“deceptive nature of pricing around the bets placed by players”,* and *“[c]lear encouragement for people to put in serious amounts of money.”*
- 5.3.21 BetIndex gives its customers and the Commission 30 days’ notice of a cut in the Dividends to be paid out.
- 8.3.21 BetIndex advises the Commission of its plan to self-suspend with a view to restructuring and relaunching.
- The Commission contacts the FCA to enquire whether there has been any update in the FCA’s position. The email notes that BetIndex *“have taken the step to inform their consumers they will be decreasing the level of dividends paid out as part of their share offering. This has, in turn, led to a sudden decrease in share price.”*
- 9.3.21 Consumer complaint to the Commission that BetIndex’s business model is unsustainable and that allowing BetIndex to change payouts of a 3-year bet on 30 days’ notice is unfair.
- 10.3.21 BetIndex letter to the Commission notes that as of midnight on 9 March, £3,434,446.36 was owed to players for cash balances.
- 11.3.21 11:16 BetIndex email to the Commission attaching a letter to the Jersey Gambling Commission indicating that BetIndex would enter administration.

BetIndex's Chief Compliance Officer confirms to the Commission that BetIndex intends to self-suspend and will be unable to allow customers to withdraw customer funds from the Football Index platform.

17:00 The Commission emails the FCA stating that the Commission now has serious concerns with BetIndex's financial circumstances and over the ability of customers to access customer funds. As BetIndex has indicated that they will temporarily be withdrawing facilities that day, the Commission has taken the decision to suspend BetIndex's operating licence.

17:15 The FCA emails the Commission stating that *"we have tentatively come to the view that the instant sell and the media dividend elements of the product are likely to fall under Article 85, but there may be an argument that the match day element does not. We do not, however, have a definitive view and are considering seeking Counsel advice in relation to the issue and interpretation of Article 85 more broadly."*

18:07 BetIndex's Chief Compliance Officer informs the Commission that she has resigned from her position.

18:43 Commission email to BetIndex states: *"As it currently stands we cannot accept this approach with regard to customer funds not being readily accessible and is in breach of the LCCP. Unless we can be assured the risk to customers is significantly reduced and they are able to withdraw their funds, as a minimum point 1) in the trust document under customer funds, we will take immediate suspension action on the licence."*

19:37 Further Commission email to BetIndex confirms that *"Unless the position of the operator moves from customers not being able to withdraw funds to being able to withdraw funds following the platform suspension, then the Commission formal licence suspension will still stand...Customer protection is the priority."*

22:05 Commission letter to BetIndex suspending BetIndex's operating licence with immediate effect.