



National Lottery
Commission

Consultation in respect of the discretion of the
National Lottery Commission to grant, or refuse,
consent to the holder of the National Lottery
Licence to provide Ancillary Services

Consultation document

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15 February 2010

The National Lottery Commission

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Legal Framework

1. The Commission is the independent public body that oversees the operation of the National Lottery, and was established by section 1 of the National Lottery Act 1998 (the "1998 Act"), replacing the Director General of the National Lottery. The Commission's overriding duties are set out in section 4 of the National Lottery etc. Act 1993 (as amended by the 1998 Act) (the "1993 Act"), which provides that the Commission must exercise its functions in the manner it considers is most likely to secure:
 - a. That the National Lottery is run, and every lottery that forms part of it is promoted, with all due propriety;
 - b. That the interests of every participant in a lottery that forms part of the National Lottery are protected; and
 - c. Subject to a. and b., the Commission shall exercise its functions in order to secure that the net proceeds of the National Lottery are as great as possible.
2. Therefore, the Commission has a hierarchy of statutory duties under which it must exercise its functions in a way that maximises the returns for good causes, so long as the National Lottery is run with all due propriety and the interests of participants in the National Lottery are protected.
3. Following the third licence competition, the Commission entered into the third licence to run the National Lottery with Camelot Group plc ("Camelot") on 1 February 2009 (the "Licence"), pursuant to section 5 of the 1993 Act, which empowers the Commission to authorise a person to run the National Lottery on an exclusive basis.
4. The terms of the Licence provide that Camelot is prohibited from carrying out "*Ancillary Activities*" unless the Commission has granted its consent. Ancillary Activities are defined by the Licence and include "*any activity of the Licensee other than the running of the National Lottery*" and the "*use of any IP [and] Licensee Assets . . . for any activity other than the running of the National Lottery.*" "*Licensee Assets*" is defined as "*all assets used in the operation of the National Lottery.*" Therefore, the Commission has the discretion to permit the use of the Licensee Assets for purposes other than the running of the National Lottery, subject to its statutory duties and general principles of public law.

The Invitation to Apply (the "ITA") for the Third Licence Competition

5. The third licence competition was formally initiated by the publication by the Commission of the final form ITA document on 29 June 2006. In the ITA¹, the Commission explained (at paragraph 6.4, under the heading "Ancillary Activities") that it was "*keen to encourage innovative ideas and methods to increase revenues through Ancillary Activities, and to share those increases as appropriate between the good causes and the Licensee. Once the [Licensee] has been appointed, the Commission will consider [their] proposals to implement such activities accordingly.*" Whilst the Commission stated expressly that proposals to implement Ancillary Activities would play no role in the evaluation of bids, it would consider them, and whether to grant consent to their provision, following the award of the Licence.
6. The Commission also noted in the ITA that, when considering whether or not to grant consent to particular Ancillary Activities, upon receipt of an application from the Licensee, it would need to ensure that:
 - a. The Ancillary Activities that were proposed were consistent with the Commission's statutory duties, set out above, contained in section 4 of the 1993 Act;
 - b. There were sufficient safeguards in place to protect the core National Lottery business and brand; and
 - c. Any exercise of the Commission's discretion to permit Ancillary Activities would be lawful, including having regard to competition law considerations.

The Commercial Services as an Ancillary Activity

7. Camelot has recently proposed to the Commission that it be permitted to operate Ancillary Activities in the form of certain commercial services, such as mobile phone top-ups, electronic bill payments, and other similar services, utilising its terminal infrastructure (a Licensee Asset) within a number of retail outlets in the UK (the "Proposal").
8. The Commission is not a specialist competition regulator, and considers that the monitoring and investigation of alleged or suspected breaches of competition law are not intended to be pursued by the Commission, given the statutory framework in which it operates. The Commission considers that the appropriate regulatory body to perform such functions is the Office of Fair Trading, which has specific statutory powers to obtain information and to impose fines for breaches of competition law. The Commission's position can be contrasted in this respect with that of certain other regulators (including, for example, Ofgem, the energy regulator) which are specifically given the status of being a 'designated body' under competition legislation.
9. However, as it made clear in the ITA, the Commission, in exercising its discretion to grant or reject consent for the Proposal, will wish to ensure that granting the permission would be lawful, having regard to competition law considerations.

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¹ <http://www.natlotcomm.gov.uk/UploadDocs/Contents/Documents/FINAL%20ITA-PART-4.pdf>

10. The Commission has decided to conduct a consultation in respect of its discretion to grant, or reject, consent to the Proposal. We are seeking views/submissions on any competition law/EU law issues arising from the Proposal which would be relevant to the Commission's decision as to whether to grant consent for the Proposal.
11. Camelot has prepared a paper (to see the paper click [here](#)) which sets out details of the Proposal. The Commission welcomes views on any competition law/EU law issues arising from the Proposal which would be relevant to the Commission's decision as to whether to grant consent for the Proposal. Bearing in mind the limited purpose and scope of the consultation, the Commission requests that any response is carefully focused (if possible) accordingly. There may be additional information regarding the Proposal to be provided to consultees, which the Commission will seek to provide as soon as possible.
12. The Commission has decided to invite Camelot Group Plc, Payzone UK Limited, ePay UK limited and PayPoint Plc, the Association of Convenience Stores, the National Federation of Retail Newsagents and the Rural Shops Alliance to participate in the consultation. The Commission seeks responses to the consultation within 56 days, namely by 12 April 2010. Given the limited and specialist nature of the consultation in the present case, and upon taking advice, we take the view that 56 days for responses is an appropriate period.
13. Following receipt of recipients' views, the Commission will consider all the responses and take advice from its advisers before it proceeds to exercise its discretion to grant or reject consent to the Proposal.
14. One of the consultees has enquired about the criteria which the Commission would apply to any specific information it may receive from the consultation when deciding how to exercise its discretion, and how the data derived from such consultation could contribute in addition to legal advice. As explained above, the Commission is not an economic regulator or a "designated body" under competition legislation and it is not its role or function to carry out a detailed economic analysis in order to come to a definitive conclusion in the same way as the Office of Fair Trading would do. Rather, any data provided by consultees will be considered in the context of legal advice on whether any competition/EU law considerations raised by consultees are valid.
15. If you do submit a response to the consultation, the Commission will only use the information you give for the purpose of the consultation. We may contact you if we need clarification on any comments made. We may publish all responses subsequent to completion of the consultation process. If you do not want your response to be published please indicate this on the covering e mail or letter.
16. Please also be aware that information provided in response to this consultation may be disclosed in accordance with the access to information regimes (primarily the Freedom of Information Act 2000, FOIA). Please also be aware that if you want the information you provide to be treated as confidential under FOIA there is a statutory Code of Practice with which public bodies must comply and which deals, amongst other things, with obligations of confidence. In view of this, if you seek to keep information confidential it would be helpful if you could explain why you regard this to be the case. We will take account of your explanation but we cannot for all circumstances give an assurance that confidentiality can be maintained.

17. Please provide any responses to the consultation in writing within 56 days (that is, by 5.00pm on Monday 12 April 2010). Responses should either be emailed to a.lovell@natlotcomm.gov.uk or sent by post to Annette Lovell, Deputy Chief Executive at the National Lottery Commission, 101 Wigmore Street, London W1U 1QU.

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