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Lotteries and Prize Promotions in the UK

Introduction

Lotteries and prize promotions in the UK are governed by the Gambling Act 2005 (the Act)¹, which came into force on 1st September 2007, and by the rules set out in the CAP Code².

Inconveniently for advertisers, the laws and regulations in relation to lotteries and prize promotions not only vary across Europe but also within the UK itself. The Gambling Act only applies in England, Scotland and Wales. The Act does not apply to Northern Ireland: any prize promotions being run in Northern Ireland will be subject to different rules.

This Ad Guide will deal in detail with rules in England, Scotland and Wales, but will also cover the separate regime in Northern Ireland.

The difference between a lottery and a prize promotion

The Gambling Act governs the rules for gaming, betting and lotteries. If a prize promotion is not a lottery and does not amount to gaming or betting, then it falls outside the Act (although it must still comply with the rules in the CAP Code)³.

The Act provides that it is illegal to run or advertise a lottery unless the lottery provider has the permission of the Secretary of State. Since running or advertising a lottery is illegal, it is important to get the distinction between a lottery and a prize promotion correct.

The National Lottery, however, is outside the scope of the provisions of the Act, to the extent that advertising it is not illegal, but advertising for the National Lottery must also comply with the rules set out in the CAP Code.

Lotteries

The Act provides a legislative definition of a lottery. It defines two types of lottery – a simple lottery and a complex lottery.

Simple Lottery

The Act states in s.14(2) that “An arrangement is a simple lottery if

- a) persons are required to pay in order to participate in the arrangement;
- b) in the course of the arrangement one or more prizes are allocated to one or more members of a class; and
- c) the prizes are allocated by a process which relies wholly on chance.”

Under the Act, simple lotteries are illegal. Therefore any randomly-allocated prize draw which requires a payment to enter is illegal. That is not to say though that advertisers are not able to run prize draws, and this Guide will consider this further below.

Complex Lotteries

The Act also defines a “complex lottery”. Unlike the simple lottery, with which lawyers were familiar before the Act, the complex lottery is a new legal concept. A complex lottery is defined in the Act in s.14(3) thus:

“An arrangement is a complex lottery if

- (a) persons are required to pay in order to participate in the arrangement,
- (b) in the course of the arrangement one or more prizes are allocated to one or more members of a class,
- (c) the prizes are allocated by a series of processes, and
- (d) the first of those processes relies wholly on chance.”

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1. See: www.opsi.gov.uk/acts/acts2005/plain/ukpga_20050019_en

2. The British Code of Advertising, Sales Promotion and Direct Marketing. See: www.cap.org.uk/The-Codes.aspx

3. Gambling Act 2005, s. 339

A complex lottery is therefore a promotion where payment is required to enter, there is more than one stage or process in the promotion and the first of these processes relies “wholly on chance”.

Such a promotion would include, for example, promotions where entrants buy a product and the product includes a Unique Number code which, if it matches would allow them to enter the next stage where they have, for example, to complete a given sentence in no more than 10 words. Success in the first stage in this case relies wholly on chance, whereas success in the second stage would rely on some level of skill. Such complex lotteries are illegal under the Act.

However, a pay-to-enter promotion whereby success at the first stage requires some level of skill to be shown, which then allows the entrant to move onto a second stage, the winner of which would be decided by chance, is a legitimate promotion. This would be neither a simple nor a complex lottery under the provisions of the Gambling Act, and therefore would not be an illegal lottery, providing other conditions are met, such as compliance with the new skill test – see below.

Prize draws

There are two straightforward ways by which advertisers can run a prize promotion without falling within the definitions of an illegal lottery. The first is to remove the element of chance. This would make the prize promotion a prize competition and is dealt with below. The second method is to remove the element of payment. It is therefore important to analyse what amounts to a “payment”.

Schedule 1 of the Act states that “a reference to paying includes a reference to

(a) paying money,

(b) transferring money’s worth, and

(c) paying for goods or services at a price or rate which reflects the opportunity to participate in an arrangement.”⁴

It is immaterial to whom a payment is made, and who receives benefit from the payment.⁵

What does not constitute payment?

The Act makes clear that certain small payments, such as the cost of a telephone call or a first or second class stamp, are not regarded as a “payment to enter”.

Although there has been some dispute over the matter, the Gambling Commission has indicated that the collection of personal data, by way of a detailed online questionnaire for example, will not usually be regarded as payment, despite the information obviously having value to the advertiser – i.e. that it amounts to “money’s worth”. However, the Gambling Commission did indicate that in certain circumstances, for example where the amount of information requested is excessive and it is obtained with the intention of selling it on to third parties, then this may be regarded as “payment”.⁶

Importantly, and in a change from the previous regime, it is only a payment for goods or services at a rate “which reflects the opportunity to participate in” the arrangement which counts as payment. This means that advertisers are permitted to run a prize draw promotion which requires entrants to purchase the advertiser’s goods or services, provided that the advertiser has not increased the price to pay for the cost of the promotion. This means that, in such circumstances, advertisers do not now need to include separate “free entry” or “no purchase necessary” routes, as used to be the case in the past.

Advertisers who wish to introduce new products onto the market place using this type of prize draw incentive will need to take care. They must ensure that they do not reduce the price once the introductory promotion has finished, and they also need to ensure that their price for the product is comparable with competitors. Manufacturers who are running this type of prize draw will not be liable if a retailer of their products independently increases the price.

What does constitute payment?

If winners are required to pay to take possession of the prize, this is regarded as a payment to enter. However, the Gambling Commission has stated that this provision does not cover situations where the winner is required to send a cheque to cover postage and packaging in order for the prize to be delivered, provided that the postage and packaging is charged at cost and is reasonable in the circumstances.⁷ It would also not prevent advertisers from awarding tickets to events as a prize, even though the winner has to pay travel costs to get to the venue.

4. Gambling Act 2005, Schedule 1, Paragraph 2

5. Gambling Act 2005, Schedule 1, Paragraph 3.

6. Prize competitions and free draws: The requirements of the Gambling Act 2005. (<http://www.gamblingcommission.gov.uk/pdf/Running%20prize%20competitions%20and%20free%20draws%20-%20December%202009.pdf>) s. 4.6(iv)

7. Prize competitions and free draws: The requirements of the Gambling Act 2005. S.4.6(v)

The Act also states that any requirement for an entrant to pay in order to find out whether they have won a prize, such as any requirement to phone a premium rate number, would count as a payment to enter.

Free entry routes

Advertisers are still entitled to include free entry routes if they wish, and they must do so if they wish the incentive to pay for itself and therefore require a payment to enter (see above for what constitutes payment). Under the Act, a genuine free entry route may be a letter sent by ordinary post or by *"another method of communication which is neither more expensive nor less convenient than entering by payment"*.⁸

This wording has caused some debate, especially about whether free entry via a website is or is not "less convenient" than a normal entry. Many phone-in quizzes on television shows, for example, rely on the availability of a web entry mechanism as well: but is logging onto a computer and visiting a website "less convenient" than simply phoning in?

The Gambling Commission has indicated that in many cases entry via a website would satisfy the requirements under the Act, but in certain circumstances this would not be the case. In particular, if an immediate response is necessary, then it is probably unlikely that web entry would be permissible.⁹

The free entry route must be publicised so that it is likely to come to the attention of the individual and the system for allocating prizes must not put people who enter by this route at any disadvantage. The Gambling Commission has suggested that the former of these two requirements means the free entry route should be given "equal prominence" as the other means of entry¹⁰, but as this wording is not in the Act, there is some objection to this view.

Prize Competitions

A prize competition is a promotion whereby the winner is decided either solely, or at least to a substantial degree, on the exercise of some skill by the entrant. Under the provisions of the Act, it is entirely legitimate to run a prize competition unless the competition amounts to gaming, betting or a lottery.

The Act, however, also states that, in order for a competition to be legal, a sufficient level of skill must be shown. Advertisers must therefore ensure that the level of skill required to win the prize is appropriate to the type of competition being run. The Act includes complicated wording to define the level of skill, which this Ad Guide deals with in detail below.

This legislated level of skill is designed to avoid situations, as had been common in the past, whereby advertisers run pay-to-enter promotions which require entrants to answer an exceptionally easy general knowledge question. Advertisers argued in the past that this rendered the promotion a competition, not a lottery, and therefore legal. Many others saw this as a loophole around the law since so many people would enter, rendering it, in effect, a prize draw. This was seen as being detrimental to consumers since they were, to all intents and purposes, paying to enter a prize draw, which was illegal. The Government has therefore tried to set out in the Act a generic description of the correct level of skill for a competition: whether this attempt has succeeded remains debatable.

In order to consider prize competitions in more detail, it is simplest to separate them into three possible types:

a) Free-entry prize competitions

If there is no payment to enter a competition, then an advertiser can run any type of competition it wishes, and any level of skill is acceptable. The rules on payment are the same as for prize draws above.

However, there is one caveat. It is important that a competition is not classified as "gaming" under the Act. Gaming is defined in s.6(1) as *"playing a game of chance for a prize"* and includes games which involve an element of chance but which can be eliminated by superlative skill, whether or not there are other participants. This may capture Call TV quizzes and online game tournaments.

b) Pay-to-enter prize competitions with a free-entry route

If the advertiser's promotion requires payment to enter, but also includes a proper free entry route, then the advertiser can run any type of competition it wishes, and any level of skill is acceptable, so long as the competition is not a gaming (see above).

The requirements for a legitimate free entry route are set out above in the section on prize draws. The same problem as to what is *"neither more expensive nor less convenient"* arises for

8. See Gambling Act 2005, Schedule 1, paragraph 8

9. Prize competitions and free draws: The requirements of the Gambling Act 2005 s.4.6(ii)

10. Prize competitions and free draws: The requirements of the Gambling Act 2005 s.4.5

prize competitions. For example, a direct-entry Call TV quiz with a premium rate number, which purports to have a free entry route via a website, may fall foul of the rules, as it can be, for many people, a lot more inconvenient to enter via a computer website than simply by sending a text from a mobile phone.

c) Pure Pay-to-enter competitions

The third type of competition is one where an advertiser requires entrants to pay to enter, and there is no free entry route. In such cases, the competition must comply with the new skill tests introduced into the Gambling Act.

The new skill test

The Act states that a promotion, or a stage of a promotion, can be regarded as relying “wholly on chance” and therefore that it does not meet the required level of skill, if the level of skill required:

“cannot reasonably be expected to prevent a significant proportion of persons who participate in the arrangement of which the process forms part from receiving a prize; and cannot reasonably be expected to prevent a significant proportion of persons who wish to participate in that arrangement from doing so.”

This complicated wording in essence means that if an advertiser’s competition question, for instance, is too simple, so that too many people enter and too many people could potentially win the prize, then the question does not meet the required level of skill. If there is payment to enter such a competition, and no free entry route, then this competition would in such circumstances constitute an illegal lottery.

The required level of skill will depend on the potential audience for the competition: a question in *The Sun* could be easier than one in *The Economist*, for example. The Gambling Commission has also stated that a question may not fail the skill test even if the answer can be found by a quick search on the internet or in a dictionary.

However, this skill test begs an important question. In many cases, will it not be impossible to know whether the advertiser has complied with the test (i.e. that there was not a significant response) until after the event? Advertisers may, after due consideration, decide on a question which then proves to have been too easy, causing the competition to be classed as an illegal lottery after it has finished.

Unfortunately, although the Gambling Commission has produced guidance which indicates that there is no need for advertisers to have conducted market research or to produce any other evidence in advance, it goes on to state that advertisers should be able to provide evidence of adequate research after the event. There is yet no case law on this point, so advertisers really are left with having to decide whether to take the risk or not.

Betting

Advertisers need also be aware of one final concern. If a pay-to-enter promotion, at any stage, requires entrants to guess or predict the outcome of a future event or the likelihood of something occurring, then this would constitute betting under the provisions of the Act. Betting is illegal, unless the advertiser has a betting licence.

This means that pay-to-enter fantasy football leagues, for example, may be illegal. Advertisers, if running such promotions, should try to ensure that they are free to enter in order to avoid their promotions being regarded as betting.

Northern Ireland

Unfortunately for advertisers, the Act has not been implemented by the Northern Ireland Assembly. Under their legislation, the Betting, Gaming, Lotteries and Amusements (Northern Ireland) Order 1985, as amended¹¹, any pay-to-enter promotion is illegal unless it has a genuine free entry route as well.

The definition of payment in Northern Ireland means any payment except the cost of a phone call or first or second class stamp. Therefore advertisers are not able to run promotions where entrants are required to purchase a product at the usual price, as you can in the rest of the UK. Advertisers wishing to run such promotions across the whole of the UK will need therefore either to include a free entry route for residents of Northern Ireland or have a free entry route for all entrants. Alternatively, they could exclude residents of Northern Ireland from entering the promotion completely, although that may serve to alienate this whole section of the public from the brand.

CAP Code

The Committee of Advertising Practice (CAP) Code includes all the rules on running prize promotions, and advertisers must ensure that they comply with these rules. The rules, set out in Section 8 of the CAP Code¹² (www.cap.org.uk), are clear and self explanatory and do not need to be gone into in depth in this note. However, sections 8.17 and 8.28 of the Code list the matters that need to be dealt with in the terms and conditions for a prize promotion in order for the promotion to be legitimate.

Sanctions and Enforcement

It is a criminal offence to breach the provisions of the Act. Offenders are subject to a fine of up to £5,000 and/or 51 weeks imprisonment. Any director of a company involved in the promotion is potentially liable. Furthermore, directors of advertising or sales promotion agencies who develop, design or run the promotion on behalf of clients, are also potentially liable.

Advertisers who do not comply with the rules set out in the CAP Code are liable to an adverse adjudication from the Advertising Standards Authority. Serial offenders may be referred to the Office of Fair Trading, which has the power to fine.

Final Thoughts

The Act has, to one extent, made life easier for advertisers, in that it allows advertisers to run promotions which offer customers entry into a prize draw when they purchase a product, without the inconvenience of including a free entry route. That is a distinct benefit of the new provisions.

It is understood that the Northern Ireland Assembly is looking into the possibility of incorporating the provisions of the Act into their local legislation, and thus enabling a pan-UK consistency in the rules, which will also be helpful to advertisers.

However, there are some difficulties in the Act, particularly in relation to the skill test which appears complicated and difficult for advertisers to meet. There has been no case law on this test yet, so until greater clarity has been provided either by the Gambling Commission or by judicial precedent, advertisers are left having to decide whether to take the risk. It appears most of them are, in fact, doing so.

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