



The Gambling Act 2005

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Introduction

The Gambling Act 2005, which came into force on 1st September 2007 reforms all aspects of gambling laws in the United Kingdom.

Once fully implemented, the Act will repeal all the existing law found in the Betting, Gaming and Lotteries Act 1963, the Gaming Act 1968 and the Lotteries and Amusements Act 1976.

The Gambling Act 2005 came into full effect on 1 September 2007. The new Act has profound implications for promotional marketing.

To understand the new law it is helpful to look at the problems under the previous regime.

Problems with the old law

Lotteries and Prize Draws

The old law, set out in the Lotteries and Amusements Act 1976 presented promoters with many difficulties.

The 1976 Act was not a triumph of drafting. Section 1 stated that all lotteries are illegal, but the Act did not provide a definition of a lottery. Case law defined a lottery as a promotion which distributed prizes by pure chance, in which participants had to pay for a chance to enter the draw.

In 1980, the *Imperial Tobacco* case decided that if a chance in a lottery was only provided to purchasers of goods or services, it would be an illegal lottery, even if the price of the goods or services stayed the same. This heralded the introduction of the "No Purchase Necessary" ("NPN") route.

The Crown Prosecution Service ("CPS") subsequently provided guidance on the requirements for a valid NPN route. The NPN had to be a genuine, realistic and unlimited alternative to entry with purchase. However, as there were few prosecutions under the 1976 Act, there was little case law to clarify the substance of this requirement. It was the *Telemillion* case in 1995 that established the free entry route must be promoted genuinely. In that case, because only a tiny percentage of entrants used the NPN route, preferring the heavily promoted premium rate telephone service entry route, *Telemillion* was found to be an illegal lottery.

Before September 2007 although reputable promoters created, funded and operated NPN routes, in practice they were often only used by a small percentage of entrants.

Competitions

Under the 1976 Act, any promoter who wished to restrict participation in a promotion to purchasers of his goods or services had a simple solution: run a competition, not a lottery.

However, to be a legal competition, success had to depend to a substantial degree on the exercise of skill and judgement. Massive uncertainty surrounded that test. Did substantial mean 'significant' or merely something more than the minimum? Were 'comprehension test' style competitions legal, i.e. where consumers read about a new product and were then asked to answer simple questions based on the relevant copy?

There was also huge uncertainty about the legality of two stage competitions. These required all participants to answer one or more questions initially (which took the promotion outside the definition of a lottery), and then all the correct entries are entered into a draw, with the final winner being drawn at random. Did that satisfy the requirement that a competition is one in which success depends to a substantial degree on the exercise of skill and judgement? The answer has always been unclear, but it probably depended upon what proportion of all participants made it into the second stage.

Finally, unwary promoters often fell foul of the prohibition on forecasting the outcome of future events, or past events, if their outcome was not yet known. This provision was intended to prevent unregulated betting but could easily trip up the unwary promoter.

To achieve compliance, promoters sometimes relied on the skill based tie-breaker question, but if the tie-breaker was too hard, it could adversely affect the rate of participation in the competition. In addition, to meet the requirements of the British Code of Advertising, Sales Promotion and Direct Marketing, all such competitions required independent verification that every valid entry and tie-breaker had been read, assessed, and the prize awarded in accordance the published criteria.

The New Definitions

Prize Competitions

Buried deep in Section 339 of the Gambling Act 2005 lies the saving provision for most forms of sales promotion, under the label of 'Prize Competitions'. This states that participation in a competition or other arrangement by which prizes are awarded is not gambling for the purposes of the Act, unless it is caught by the Acts' definitions of 'Gaming', 'Lottery' or 'Betting'. They are what constitute 'Gambling' for the purposes of the Act. If the promotion can steer clear of those definitions, it will therefore be legal, subject to compliance with the other applicable laws and regulations mentioned at the end of this Guide.

A careful examination of these definitions is necessary to achieve compliance, starting with the definition of a lottery, as that is most likely to be of concern.

Lottery

A Lottery is defined in Section 14 of the Act as a promotion in which participants are *required* to make a *payment* for a chance to win one or more prizes (which can be money, goods or services) which will be awarded to one or members of a class of people, using a process that is based *wholly* on chance. If there is just one such process, it will be a 'Simple Lottery'. If there is a series of processes, it will be a 'Complex Lottery' but only if the *first* of these processes relies wholly on chance.

This also means that a competition will be legal if it requires skill and judgement or knowledge in such a way that can be 'reasonably expected' either to prevent a significant proportion of would-be participants from taking part, or to prevent a significant proportion of actual participants from winning a prize.

So a quiz which only requires a 'derisory' level of skill will still be illegal, unless participants are not required to pay to enter the promotion,

in which case it will remain outside the scope of a lottery regulated by the Act, and be treated as a prize competition, rather than as gambling. This is good news for the new product launch "comprehension test" competitions, beloved of PR agencies.

What constitutes payment for the chance of winning?

The Act has adopted the so-called 'New Zealand' model for defining when a participant has been *required* to pay for a chance in a lottery. The details are set out in Schedule 2 of the Act.

It is not regarded as a payment for a chance if the purchaser of goods or services pays the normal price or rate for those goods or services, and not at a price or rate that reflects the opportunity to participate in the promotion.

This means that a promotion where the purchaser of goods or services, offered at their regular prices, is entered into a free prize draw will not be caught by the definition of a Lottery, and will therefore remain outside the scope of the Act, even without a No Purchase Necessary route.

Schedule 2 also confirms paying for postage or telephone calls at the normal rate does not constitute payment. On the other hand, a premium rate call which reflects the opportunity to enter a promotion will not be a means of "free" entry.

However, where payment is required to discover whether a prize has been won, or to claim a prize, the promotion will be a Lottery.

This means that a free prize draw to win vouchers for money off the cost of a holiday may be a Lottery. This will be a serious practical problem for many promoters. The Gambling Commission has indicated that it does not believe Parliament intended to prohibit this type of promotion. The Advertising Association has asked for clarification on this point from the Gambling Commission.

Finally, Schedule 2 also sets out the

requirements of an alternative free entry route, in case a promoter wishes to use it to avoid being caught by the definition of a Lottery. This alternative route may involve the incidental cost of ordinary post or another method of communication which is neither more expensive nor less convenient than paying to enter the promotion.

The alternative free entry route must be publicised such that it is likely to come to the attention of every individual participant and the prospects of success must be the same, regardless of the entry method being used.

Gaming

Section 6 defines 'Gaming' as playing a 'Game of Chance' for a prize. The definition of a Game of Chance is not exhaustive. It expressly excludes a sport, but it can include *any* of the following:

- > A game that involves both an element of chance and an element of skill;
- > A game that involves an element of chance that can be eliminated by superlative skill; and
- > A game that is presented as involving an element of chance.

It does not matter whether or not the player is playing against other players, or even against a computer. The prize can either be money, or money's worth, and can either be stake money contributed by the players, or a prize fund contributed by the organiser. It also does not matter whether the player risks losing anything by playing, provided that he acquires a chance to win a prize.

A free prize draw will not be caught by the definition of gaming because it does not involve playing a game. Although this definition may not capture most traditional sales promotion techniques, it could capture the on-line games of chance that brand owners increasingly use to engage with their customers. These will require careful analysis to decide

whether they are caught by the definition of Gaming, particularly as there is no requirement that players have to pay to play.

Betting

The old prohibition on sales promotions that involved forecasting has been maintained by clarifying the definition of Betting in the context of prize competitions in Section 11 of the Act. A prize competition will be Betting if:

- > participants either have to guess or use skill or judgement to predict the outcome of a race, competition or other event, the likelihood of an occurrence, or whether anything is true or false; and
- > participants are required to pay to enter the promotion; and
- > the winner is the person whose guess is accurate, or most accurate.

This catches 'fantasy football' competitions, which from now on will need to be licensed.

The provisions concerning the 'requirement to pay' are set out in Schedule 1 of the Act and are the same as referred to above in connection with Lotteries.

This also seems to open up new opportunities for promotions.

Promotions which are linked to purchase but without any mark up on the pre-promotion sale price, and ask participants to forecast the outcome of a future event will now be legal. This will be particularly useful for brand owners who sponsor major sporting events and want to promotional tie-ins linked to purchase of their goods.

Northern Ireland

The Gambling Act 2005 will not apply to Northern Ireland. The law in Northern Ireland remains unchanged—fundamentally the same as the pre-September 2007 position in England and Wales. Consequently, promoters should obtain specific advice in relation to running a promotion including Northern Ireland ("NI"). Promoters could consider either

- a) excluding NI from UK promotions where it otherwise seeks to take advantage of the definitions of lottery;
- b) Continue to offer a free entry facility to NI participants; or
- c) offer a free entry rate across the UK.

Future Developments

The Gambling Commission and other industry bodies will hopefully continue to provide guidance on an ongoing or periodical basis.

It is also important for promoters to comply with other legislation in this area, including the Data Protection Act 1998, ICSTIS Codes (now PhonepayPlus), as well as self-regulation, particularly the British Code of Advertising, Sales Promotion and Direct Marketing, administered by the Advertising Standards Authority ("ASA"), which contains many of the detailed requirements for the mechanics and administration of promotional marketing activities, such as an independent audit state for instant win promotions, and independent judge(s) for competitions. The ASA Survey in On-Pack Promotions highlighted that there

were may more administration breaches than content breaches, usually because "the promoter could not demonstrate that prize draws were conducted, or instant win prizes distributed, under the supervision of an independent observer".

Finally, there is also the prospect of further developments coming from the European Union, either in the form of the Sales Promotion Regulation, if it is resurrected, or in the provisions of the Unfair Commercial Practices Directive.

For further information on this subject, please contact:

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