



## The Gambling Act 2005

What does it mean for promotional marketing in practice?

- Problems with the old law
- The aims of the new law
- The new definitions
- Future developments

## Introduction

After several years of consultation, the Gambling Act 2005 was finally enacted in April 2005. The Act represents a root and branch reform of all aspects of gambling laws in the United Kingdom. Once fully implemented, the Act will repeal the three existing pieces of legislation that have governed this area for many years: the Betting, Gaming and Lotteries Act 1963, the Gaming Act 1968 and the Lotteries and Amusements Act 1976. Although the new laws affecting promotional marketing will not be fully implemented until September 2007, it is already obvious that the new Act will have profound implications for everyone involved in any form of promotional marketing.

To understand the advantages of the new law, and the existing problems that may still remain, it is helpful to look at the problems under the current regime.

## Problems with the current law.

### Lotteries and Prize Draws

The old law, set out in the Lotteries and Amusements Act 1976 presented promoters with many difficulties, and after 30 years on the statute books, reform was well over due.

It is fair to say that 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 eventually defined a lottery as a promotion that involved the distribution of 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 provided to purchasers of goods or services together with their purchase, it would be an illegal lottery, even if the price of the goods or services stayed the same. This heralded the introduction of the much maligned “No Purchase Necessary” route that enabled promoters to run “instant win” type promotions.

The Crown Prosecution Service (“CPS”) subsequently provided guidance on the requirements for a valid No Purchase Necessary (“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 *Telemillion* case in 1995 that established that although the free entry route was being operated honestly, it was not being promoted genuinely. The promoter hoped that few entrants would use this route, in place of the more heavily promoted main entry route, which was a premium rate telephone service. *Telemillion* was therefore deemed to be an illegal lottery in breach of the 1976 Act.

Today, reputable promoters create, fund and operate NPN routes, but in practice they are still used by only a small percentage of entrants.

## Competitions

Under the 1976 Act, any promoter wishing to restrict participation in a promotion to purchasers of his goods or services has a simple solution: run a competition, not a lottery. This, however, created problems of its own.

First, to be a legal, success in a competition must depend to a substantial degree on the exercise of skill and judgement. Massive uncertainty surrounds this test. Does substantial mean ‘significant’, or merely something more than the minimum? What does it mean for the ‘comprehension test’ style of competition question, where consumers read the text about a new product, for example, and are then asked simple questions whose answers can be found in the text? What does it mean for more numerical based questions where participants could as easily guess the answer, as apply skill or judgement?

Second, there is huge uncertainty about the legality of two stage competitions. These require all participants to answer one or more questions initially, (which takes 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. Does this 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 is it depends upon what proportion of all participants makes it into the second stage, but there is no statutory or judicial authority as to what that proportion must be. 10%? 25%? 50%? 75%? No one knows.

Finally, unwary promoters can easily fall foul of the prohibition on forecasting the outcome of future events, or past events, if their outcome is not yet known. This provision was intended to prevent unregulated betting, but can easily trip up the unwary promoter. For example, a sponsor of a sporting event such as the World Cup in Germany in 2006 might want to run a competition asking participants who will win the tournament. Under the current law, this will be illegal, although it is still unclear as to whether it will be legal under the new law either!

For many years, promotions have been run with a high degree of legal uncertainty, with promoters simply relying on the historically low levels of enforcement by the authorities. However this presents further problems, because contracts related to the promotion may be unenforceable, on the basis that they are contracts for an illegal purpose. In addition, there is no shortage of amateur promotional law experts and competition fanatics waiting to drain the time and resources of a promoter in a long winded debate about the legality of a promotion.

On the other hand, many large and mainstream promoters are anxious to comply with the letter and the spirit of the 1976 Act, regardless of the low risk of enforcement. In order to remove any doubt about compliance, these promoters often rely on the skill based tie breaker question. But this solution has its own drawbacks. If the tie-breaker is too hard, it can adversely affect the rate of participation in the promotion. In

addition, to meet the requirements of the British Code of Sales Promotion, all such competitions require independent verification that every valid entry and tie-breaker has been read, assessed, and the prize awarded in accordance with the published criteria.

In truth, it appears that reform of promotional marketing law was not a top priority when the government decided to introduce the Gambling Act 2005. Most of the new Act deals with gambling, betting and gaming, as well as lotteries in their true sense, rather than in the context of sales promotions and promotional marketing. Nevertheless, the government also intended to create greater certainty for legitimate businesses engaged in sales promotion activity and end a situation where the law is being routinely infringed, but without any enforcement.

## The New Definitions

### Prize Competitions

Buried deep in Section 339 of the Gambling Act 2005, you eventually find the definition of 'Prize Competitions'. These are defined in the negative, as any competition or other arrangement by which prizes are awarded, and which are not caught by definitions of 'Gaming' in Section 6, a 'Lottery' in section 14, or 'Betting' in Sections 9 to 11. 'Gambling' is defined collectively in Section 3 as 'Gaming', 'Betting' or 'participating in a Lottery'. So if a promotion does fall within the definition a Prize Competition, then Section 339 expressly states it is *not* gambling for the purposes of the Act. The promoter is therefore in the clear, subject to compliance with the other applicable laws and regulations mentioned at the end of this Guide.

A careful examination of the following definitions is therefore called for, to ensure that they do not apply to any planned marketing programme.

### 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 they acquire 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 game. But 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 the game.

### 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 are series of processes, it will be a 'Complex Lottery' but only if the first of these processes relies wholly on chance.

### When will a process rely wholly on chance?

The Act also addresses the conundrum about promotions that include both an element of chance, and an element of skill and judgement, or knowledge. These promotions will still be deemed to be lotteries if the skill or judgement required cannot reasonably be expected to prevent a significant proportion of participants from winning a prize or from wishing to participate. So a quiz with easy questions 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 Public Relations 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. This reflects the previous well-established common law postal rule.

The law has also now caught up with a controversial promotional technique that has developed since the 1976 Act was passed. This is where a payment is required to discover whether a prize has been won, or to claim a prize that has been won. Such payments will mean that these promotions are Lotteries, and governed by the requirements of the Act, rather than Prize Competitions, which fall outside it.

Unfortunately, however, the new Act will also mean that legitimate mechanics that have been used for many years may no longer be lawful. For example, a free prize draw to win vouchers for money off the cost of a holiday, for example, may now be seen as a requirement to pay to participate in the promotion. If so, the promotion will not be a prize competition, but a lottery caught by section 14. This will be a serious practical problem for many promoters.

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 cost of ordinary post or another method of communication which is neither more expensive nor less convenient than paying to enter the promotion. However, in practice what could be more convenient than entering there and then by buying a product in a store, versus making a note of a contact address, going home, and writing out an email, let alone writing and posting a letter? One must hope that the courts will take a liberal approach.

In addition, there is a requirement that captures the spirit of the old CPS guidance and the *Telemillion* case referred to above. The alternative 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 used.

## 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 promotion will be caught by the definition of 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.

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.

## Future Developments

The Act is due to be implemented in stages, to be completed by September 2007. The Gambling Commission came into being in October 2005, and has set about the process of preparing guidance on the Act.

It is also important for promoters to remember that other legislation will continue to be significant in this area, including the Data Protection Act 1998, 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 statement for instant win promotions, and independent judge(s) for competitions. The ASA Survey in On Pack Promotions highlighted that there were many 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 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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