

Contests, games and draws: The UK sales promotion law



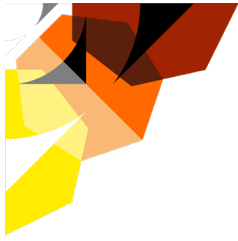
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Introduction

The Gambling Act 2005, which came into force on 1st September 2007, includes a number of provisions that impact directly upon the legality of promotional contests, games and draws in the UK. It does not extend to Northern Ireland, however, which can have significant consequences.

Following controversy surrounding a number of “Win-a-House” promotions, the Gambling Commission issued fresh guidance in December 2009 to give greater certainty to promoters as to how the Gambling Act provisions will be enforced.

In addition to the long-established rules on data protection and the relevant self-regulatory codes, promoters should also be aware of the new Consumer Protection from Unfair Trading Regulations 2008, which make illegal various misleading practices in respect of prize competitions and draws.

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 Act’s definitions of ‘Gaming’, ‘Lottery’ or ‘Betting’. If the promotion can steer clear of those definitions, it will be legal, subject to compliance with the other applicable laws and regulations mentioned towards the end of this Guide.

Lotteries

A lottery is defined in Section 14 of the Act as a promotion in which participants are required to make a payment for an opportunity to win one or more prizes (which can be money, goods or services) and those prizes are awarded to one or more people using a process that is based wholly on chance. The key issues to be addressed in order to avoid a promotion being an illegal lottery are therefore: a) ensuring that the process is not based wholly on chance; and/or b) avoiding any requirement of payment for entry.

Gambling Commission Guidance

While the Commission does not regulate or give clearance for legal prize competitions, it is the authority responsible for prosecuting illegal lotteries and it has issued detailed Guidance on how the boundary should be drawn between the two. This was partly prompted by the doubts raised over the legality of a series of online “Win a House” competitions. Participants had to answer a question before paying to be entered in a draw to win a house, but the answer could easily be ascertained through some basic internet research.

Although the Guidance is discussed below, ultimately only the courts can give definitive answers.

When is a promotion based wholly on chance?

A promotional contest will be based wholly on chance if little or no skill, judgement or knowledge is required to complete it. In its Guidance, the Commission cites crosswords and other complex puzzles as examples of where there is obviously sufficient skill, judgement or knowledge to be legal. On the other hand, a single simple question “where the answer can easily be found on the internet, is widely or commonly known by the general public, appears in the accompanying text or narrative, or is obvious within a programme” will not be sufficient. The Commission has developed a number of indicators that it will apply, for example:

- in multiple choice formats, whether there are sufficient plausible alternative answers (disregarding any “joke” answers);
- the number of questions required to be answered;
- the complexity of the question/puzzle posed.

In borderline cases, section 14(5) of the Act deems a promotion to be based wholly on chance if the skill, judgement or knowledge required cannot reasonably be expected either (a) to prevent a significant proportion of would-be participants from taking part, or (b) to prevent a significant number of actual participants from winning a prize. In its Guidance, the Commission points out that the more valuable the prize on offer, the more difficult the questions may need to be in order to deter sufficient participants.

The Commission expects promoters relying on the s.14(5) tests to be able to provide evidence of the numbers of deterred participants, and/or to demonstrate the reasonableness of their assumption that a significant number would be deterred. It will expect promoters to keep relevant records, and to consider whether specific legal advice might be needed.

A number of the “Win a House” competitions involved participants answering questions first,



and only being obliged to pay to enter once they knew that they had answered correctly. The Commission says that it will consider the second stage of such competitions to amount to an illegal lottery. Although it has not yet chosen to bring any prosecutions, the Commission raised further concerns about the rise in “win-a-house” competitions in 2017 and, in December 2018, took active steps to close down a “win-a-house” competition that followed this format.

Even though a competition which only requires a low level of skill, judgement or knowledge will potentially be an illegal lottery, it should be remembered that if participants are not required to pay to enter it will remain a prize competition outside the scope of the Act. This is good news for the new product launch “comprehension test” competitions, beloved of PR agencies.

What constitutes payment for entry?

Schedule 2 of the Act sets out when a participant should be treated as having been required to pay to enter a prize promotion.

It is not regarded as a payment to enter if the purchaser of goods or services is entered in a prize promotion and pays the normal price or rate for those goods or services, rather than an increased price that reflects the opportunity to participate in the promotion.

Schedule 2 also confirms that 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, even if the premium benefits the telecommunications company rather than the promoter.

It should be noted that the Act expressly treats any payments (for example premium rate phone calls) required to discover whether a prize has been won, or to claim/take delivery of a prize, as potential payments for entry. However, the Gambling Commission’s view is that this does not prevent promoters from requiring winners to pay “normal delivery or other normal costs needed to obtain or use the prize” such as normal delivery

charges, or the winner of a car being required to pay for insurance and road tax.

Free prize draws to win “money-off” vouchers may be regarded as a Lottery, particularly if the participant has to spend money on the promoter’s own goods or services in order to redeem the voucher.

Alternative free entry routes

To ensure that a promotion is a free draw rather than an illegal lottery, the promoter can either provide a single entry route which is free, or it can provide an alternative free entry route. This alternative route may involve the normal incidental cost of ordinary post or another method of communication which is neither more expensive nor less convenient than paying to enter the promotion. It 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 and Betting

Prize promotions can also fall foul of the Gambling Act provisions on gaming (playing a game of chance for a prize) and betting (predicting the outcome of a race, competition or other event, the likelihood of an occurrence, or whether something is true or false).

A free prize draw or promotional competition will not usually be caught by the definition of gaming because they do not involve proactively playing a game. But on-line games of chance may be caught. These will require careful analysis, particularly as there is no requirement that players have to pay to play.

If a promotion falls within the definition of betting, an operational licence must be obtained, but there must be a “requirement to pay” before the promotion amounts to “betting”. Promotions which are linked to purchase but without any mark up on the pre-promotion sale price, and which 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 promotional ties linked to purchase of their goods.

On the other hand, the definition of betting definitely does catch ‘fantasy football’ competitions, which from now on will need to be licensed.

Northern Ireland

The Gambling Act 2005 does not apply to Northern Ireland. The applicable law in Northern Ireland is the Betting, Gaming and Lotteries and Amusements (NI Order) 1985. Consequently, the law in Northern Ireland remains fundamentally the same as the pre-September 2007 position in England and Wales.”

The Northern Ireland Executive announced back in 2013 an intention to bring its laws more in line with the rest of the UK by 2015. This never happened. More recently, however, the Department for Communities (or DfC) carried out a consultation on potential changes to Northern Ireland gambling laws, which included the rules governing sales promotions. In the consultation, between December 2019 and February 2020, the DfC considered whether the rules on prize promotions in Northern Ireland should be aligned with the rest of the UK. It therefore seems more likely than ever that it is only a matter of time before these laws are harmonised across the UK. In the meantime, however, 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) continuing to offer a free entry facility to NI participants; or
- c) offering a free entry route across the UK.

The Consumer Protection Regulations

All aspects of promotion and marketing in the UK have been impacted by the Consumer Protection from Unfair Trading Regulations 2008 (CPRs), which implement into UK law the requirements of the EU Directive on Unfair Commercial Practices. In addition to a general prohibition of unfair and misleading practices in business-to-consumer transactions, the CPRs include two items in its

“blacklist” of prohibited practices that are of particular relevance to promotional competitions.

First, it will in all circumstances be considered unfair (and a criminal offence) “to claim to be offering a competition or prize promotion without awarding the prizes described or a reasonable equivalent.” Guidance issued by the Office of Fair Trading (the now defunct government agency previously responsible for protecting consumer interests in the UK) gives as an example of an unlawful practice a trader who operates a scratch-card promotion with a claimed top prize of £10,000, and deliberately does not print, or withholds from circulation, any winning card. If nobody wins the prize in accordance with the rules, then of course no prize should be awarded.

Secondly, a promotion will also always be unfair under the CPRs if it creates the false impression that the consumer has already won, will win, or will on doing a particular act win, a prize or other equivalent benefit, when in fact either (a) there is no prize or other equivalent benefit, or (b) taking any action in relation to claiming the prize or other equivalent benefit is subject to the consumer paying money or incurring a cost.

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. There is also a useful CAP Help Note on Promotions with Prizes, available on the CAP website.

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Other relevant sources of law and regulation

It is also important for promoters to comply with other legislation and codes in this area, including the Data Protection Act 2018, the GDPR (relating to premium rate phone services), and relevant self-regulatory arrangements, particularly the British Code of Advertising, Sales Promotion and Direct Marketing (“CAP Code”), enforced by the Advertising Standards Authority. The CAP Code