

Advertising: New Rules on Competitions and Prize Draws Take Effect in the UK

The UK Gambling Act 2005 comes into full effect on 1 September 2007. While the main aim of the act is to regulate the gambling industry, it also seeks to provide clarity on what is and is not permitted to those who operate prize draws and prize competitions for other commercial purposes.

Competitions have long been a favourite tool for the advertising industry—whether promoting products generally by offering a chance of a prize with purchases or running competitions to promote TV shows or more indirectly by, for example, offering a chance of a prize to those who provide data for a survey or to establish a database.

The old law was based on a mixture of statute and case law and, frankly, was not well policed. However, such competitions in the UK have received a lot of criticism recently because of a number of well publicised scandals involving “rigged” TV competitions. The Act has also established a specialist regulator. A greater degree of scrutiny can therefore be expected.

While the fundamentals of the law have not greatly changed, the new Act seeks to set out clear distinctions between the various categories of competition and to clarify the tricky borderline areas. The new regulator for the sector, the Gambling Commission has also supplemented the Act with useful guidelines, though it acknowledges that it will be for courts ultimately to decide in contentious areas.

The Basics

The major distinction under the Act—so far as sales promotions are concerned—are between *Prize Competitions* and *Free Draws*, which are lawful and not subject to regulation or statutory control, and *Betting* and *Lotteries*, which are

regulated activities and are not lawful (except for certain minor private activities in workplaces or clubs, for example) without a license. It is a criminal offence to offer or promote either a lottery or betting without a licence with a maximum penalty of a fine and up to 51 weeks in prison. Therefore, it pays to get the distinction right!

The Act in Section 14 defines two types of lottery: simple and complex.

An arrangement is a *simple lottery* if:

- persons are required to pay in order to participate;
- one or more prizes are allocated to participants; and
- the prizes are allocated by a process that relies wholly on chance.

A *complex lottery* again requires payment to participate but the prizes are allocated by a series of processes and the first of those processes relies wholly on chance.

The distinction between a regulated lottery and an unregulated prize draw (which also depends purely on chance) is therefore (in theory, at least) simple. If the participant has to pay to enter, then it is a lottery. If not, it is a *free draw*.

A *prize competition* can be distinguished from a lottery by the fact that the prizes are not allocated purely by chance but the competition *requires persons to exercise skill or judgement or to display knowledge*. Under the old law this was defined as a “game of skill”, and the distinction was much abused. For example, a favourite trick was to have a series of quiz questions as a condition of entry and to include the answers in the editorial text of the advertisement.

Not every exercise of skill or judgement will take a competition outside the scope of the Act. *Betting* is defined in Section 9 of the Act as making or accepting a bet on:

- the outcome of a race, competition or other event or process;
- the likelihood of anything occurring or not occurring;
- whether anything is or is not true.

If the skill required to enter the competition consists of any of the matters set out in Section 9 and the participant is, again, required to pay to participate, then this will be regulated betting and not a lawful prize competition. It is therefore best to be careful to avoid anything remotely like the Section 9 areas or to ensure that no payment is required.

Other than this, it is possible to charge for entry to a genuine prize competition.

Payment to Enter

The concept of payment to enter has always caused difficulty. Schedules 1 and 2 of the Act seek to provide some guidance. The Act states that payment “includes”:

- paying money;
- transferring money’s worth; and
- paying for goods or services at a rate which reflects the opportunity to participate in the competition or draw.

These categories are not exhaustive. Payment to participate goes wider than a simple entry payment. It also includes a requirement to pay to discover whether the prize has been won or to claim the prize. It does not matter to whom the payment is made or who receives the benefit, so a premium rate paid to the telecoms operator will also be caught.

The following are NOT deemed to be payment:

- sending a letter by ordinary post;
- making a telephone call; or
- using other methods of communication “at normal rate”.

Even if payment is required, the draw may fall outside the Act if an *alternative “free” entry route* is provided whether by sending a letter by ordinary post or by another method that is neither more expensive nor less convenient than the paid entry route. The alternative must be well publicised and the allocation of prizes must not discriminate against the “free” entries.

The free entry route should not be confused with the old “no purchase necessary” rule which provided that, where a competition was part of a product promotion, payment for the product itself was payment to enter unless an alternative route to enter was provided. This was much abused by promoters who simply printed “no purchase necessary” on the product but provided no real alternative.

As will be seen above, where a competition is offered to those buying a product, the purchase of the product itself will not be payment to enter, if it is at the normal price and includes no additional cost beyond the normal cost of the product to reflect the chance to participate. This will be a matter of fact in each case. Clearly, if the product itself is of little value and the main benefit of purchase is the competition, this will be outside the exemption. It would also probably be wiser not to increase the price just before the competition or the promoter may be called upon to prove that this was not a payment for the competition. In general, however, it is no longer necessary to provide a “no purchase necessary” alternative for product promotions so the phrase should disappear from the shelves.

The Gambling Commission has addressed some of the questions left by the wording of the Act in regard to payment. While the courts will finally decide, their guidance is that:

- Provision of data as a condition of entry is not “transferring money’s worth” where the data required is proportionate. If large quantities of data are required—particularly with a view to its sale to third parties—this may be “payment”.
- “Normal rate” will depend on the circumstances. Standard landline or mobile tariffs will not be payment but special premium rates which include an element of paying for the competition—as was the case for most recent TV quizzes—clearly will be.
- An alternative of entry via a website may be an adequate “free” route in certain circumstances—where, for example, the target audience is likely

to have easy access to the internet or the entry period is quite long—but will fail the “no less convenient” test if the time for entry is limited—for example during a live TV show.

- The “free” route must fall within the areas which are not deemed payment under the Act, for example, normal post. It is not possible to escape the Act by having two entry routes, one of which is marginally cheaper than the other, even though the Act could be read as ambiguous on the point.

Prize Competitions: How much skill is required?

As previously noted, the old “game of skill” test was much abused and the Act seeks to lay down a minimum test. Section 14(5) states that a process will be regarded as wholly relying on chance, that is, not a lawful prize competition if:

- the requirement 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; or
- the requirement cannot reasonably be expected to prevent a significant proportion of persons who wish to participate in that arrangement from doing so.

Printing the answers to the quiz right next to it will clearly be out, therefore but crosswords or a sudoku are acceptable as these will deter a significant number of participants.

The Commission expects litigation in this area but believes that the test is twofold: Did the skill requirement *in fact* eliminate a significant proportion of potential entrants and, if not, on what basis did the organisers conclude it was reasonable to expect it to do so?

It will be fairly simple to show how many people entered but got the wrong answer, to satisfy the first arm of the test. The second may be more difficult. The Commission has indicated that it will be looking to organisers to take steps to estimate the likely proportion to be eliminated. It is not enough, for example, to compare the audience figures for a programme with the number of entries. The organiser would have to show evidence of the normal proportions of viewers who respond.

There is an indication that they may be prepared in some circumstances to be flexible where an attempt has been made to have a real skill test but the question has been misjudged. A second such failure will be more likely to lead to prosecution.

Tie Breakers

The traditional means of ensuring that the degree of skill was adequate was to have a tie break, where the participant would be required to complete a short sentence and the best entry would win. This would still seem to satisfy the skills requirement of the new Act. However, organisers should bear in mind that any promotion will still need to comply with the requirements of the British Code of Advertising, Sales Promotion and Direct Marketing which require, *inter alia*, that the judge of any tie breaker should be independent of the promoters or that a panel of judges should contain at least one independent member.

This has generally been regarded as a complete pain. Under the new rules, it should be easier to put together a safe game of skill even without a tie break. It should be borne in mind that provided a substantial proportion of the potential entrants have been eliminated or discouraged, the test for a prize competition will have been satisfied and the winner if there are multiple correct entries can still be selected by chance.

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This update was authored by Peter Crockford.

Practice group contacts

For more information, please contact one of the lawyers listed, or the Dechert lawyer with whom you regularly work. Visit us at www.dechert.com.

Peter R. Crockford
London
+44 20 7184 7506
peter.crockford@dechert.com

Renzo Marchini
London
+44 20 7184 7563
renzo.marchini@dechert.com

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www.dechert.com

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