

Prize Competitions & Free Draws – The Gambling Act 2005

The Gambling Act 2005 ('Act') came fully into force on 1st September 2007.

In so doing, the Act repealed the previous statutes relating to gaming, lotteries and the operation of draws and competitions; such that the Act is now the main mechanism regulating the legality and operation of these activities.

The majority of the Act is concerned with the regulation of gambling and lotteries, including offshore and internet-based operations. However, our concern in this legal update is to describe and delineate the concepts of prize competitions and free draws, which fall outside the Act and are therefore not subject to the regulation and other restrictions contained in the Act.

What are prize competitions and free draws?

To understand what we are talking about, we first have to understand the concept of a lottery, which is defined by the following elements:-

1. Payment for the right to participate;
2. Prizes available to those entering; and
3. Prizes allocated (wholly or initially) by chance.

The key elements here are 'payment' and 'chance', such that the absence of either will take the activity outside the scope of the Act. If the outcome or participation in the event is dependant upon the exercise of skill rather than on chance, the activity will not qualify as a lottery and instead will be a prize competition. If the competition is free to enter, it will amount to a free draw rather than a lottery.

Prize Competitions

A prize competition is one where success depends on the exercise of skill, judgement or knowledge on the part of the participant, the exercise of which is sufficient to either (i) prevent a significant proportion of people from taking part, or (ii) prevent a significant proportion of them from receiving a prize.

The exercise of the required skill can be a precursor to entry into the competition itself or else the factor which determines who wins a prize. The important thing is that the exercise of that skill must have an effect on a 'significant proportion' of people, so as to prevent them from entering the competition or winning a prize.

This requirement effectively places a de minimis standard on the level of skill, judgement or knowledge required so that, for example, questions which have answers which are glaringly obvious or widely/commonly known would not satisfy that standard. The Gambling Commission has indicated that number or word puzzles are good examples of what would be acceptable as means of excluding a significant proportion of people. However, they have not chosen to explore the wide, and likely contentious area, which lies between these and answers which are all too obvious or commonly known. The term 'significant' is not defined in the Act and it provides no guidance in this respect. The Gambling Commission suggest that the phrase should take its 'ordinary, natural meaning' but we don't consider this takes us any further in understanding the likely interpretation of this key phrase.

In the absence of decent guidelines (which are likely to be developed over time by the courts on a piecemeal basis) organisers may be tempted to rely on good old common sense in order to determine whether the standard of entry is set sufficiently high. Unfortunately, people will differ in their views over what is sensible, just as they will differ in their views over what is significant. The operation of an illegal lottery carries a possible criminal conviction and a fine of up to £5,000 and/or imprisonment for up to 51 weeks, so we cannot recommend that clients leave the issue to the application of common sense.

Instead, we recommend that practicality has to prevail here and, for this reason, we would urge organisers to consider carrying out a pre-test or poll of potential responses, in order to gauge the degree of difficulty of the entry requirement. The need for a test or poll may not be great where

the test requirement is an eliminator for a prize once participants have entered the competition (as the number of wrong answers should be easily established). However, the need is likely to be much greater where the question is the precursor to entry to the competition, as organisers will not know (in all likelihood) what proportion of people were disinclined to even attempt an answer unless they were sure of it.

In the event of any investigation by the Gambling Commission, the onus of proof lies with the organiser, who must be able to demonstrate either that the standard excluded a significant proportion of people or else that it was reasonable for the organiser to assume that it would. When faced with such a burden, poll/pre-test evidence would be invaluable and almost certainly conclusive from the Gambling Commission's point of view. While this suggestion does involve an additional level of effort and probably some cost we consider it merited, particularly in the case of competitions of any size.

Free Draws

Free draws have always been exempt from statutory control and will continue to be exempt under the Act. They lack the element of payment necessary for an arrangement to qualify as a lottery.

In fact, the Act distinguishes between two types of free draw. The first is where there is only one route of entry, which is 'free' and which includes any method of entry (such as post or telephone) at a 'normal rate'. Essentially, this standard requires that the participant must pay no more than they would normally pay for this type of communication – i.e. the usual rate for post in this country or the usual rate for a telephone call. If this standard is not met – i.e. if the participant pays any premium for entry – the arrangement will not be a free draw and may therefore be subject to the requirements of the Act.

The second type of free draw is where there is a choice of method of entry, provided that at least one of the methods of entry is at the 'normal rate' and is neither more expensive nor less convenient than the paid-for route. Moreover, the organisers have to ensure that the choice of methods of entry is publicised so as to come to the attention of potential participants and that the allocation of prizes does not favour any method of entry. The net result of this is that a draw still counts as free as long as this 'normal rate' method of entry is available and made known. These requirements also apply to draws where the participants may have to pay

in order to discover whether a prize has been won or to take possession of a prize.

Some of the difficulties of the 'normal rate' requirement stem from the number of different ways in which people may now choose to entry a draw, such as text, email or other web-based systems. Although the facts of individual cases may vary, the Act offers us the following principles in reaching decisions on whether the participant has paid any premium relating to their entry:-

- it is irrelevant to whom the payment is made or who benefits from the payment;
- it is not sufficient that an alternative method of entry is free. It must also be no less convenient than the paid-for method, so that nothing should disadvantage anyone wishing to use the free route of entry;
- the yardstick for whether any charge made for a method of communication is at the 'normal rate' should be judged against the usual rate for that method paid by the user in sending a similar non-commercial communication. Where the charge includes any premium or anything reflecting an opportunity to enter the draw, then the method will not be at the normal rate;
- generally, the concept of payment is limited to money or money's worth, so that e.g. the requirement for the 'provision of data' by individuals would not count as payment; and
- in the case of any requirement to pay to collect a prize, the payment should be no more than someone would be normally expected to pay for delivery.

While cases need to be judged on their individual merits, the basic premise is that no premium must be payable for entry and that entry must be no less convenient than the paid-for route.

Summary

This Update provides a brief summary of the law applicable to prize competitions and free draws under the Act.

We recommend that clients ensure that they are able to justify and defend any decision made with respect to any standard of skill or method of entry. We have suggested that clients consider the use of polls or pre-tests for the proof of the standard of skill. However, it is equally important that

January 2008

clients properly research and benchmark costs associated with entry, so as to establish the 'normal rate' of entry for a method of communication.

In the case of any investigation by the Gambling Commission, the provision of such documentary evidence may very prove invaluable. If it does not conclusively prove compliance with the required standards, it may very well be enough to show that it was reasonable for you to act in the way you did – which is all the Act requires that you show.

© J P Mitchell, 2008