

Prize competitions and free draws: The requirements of the Gambling Act 2005

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1 Introduction

- 1.1** Prize competitions and free draws are free of statutory regulatory control under the Gambling Act 2005 (the Act). Such competitions and draws can therefore be organised commercially for private benefit and profit. This contrasts with public lotteries, which are the preserve of good causes, and must, unless they qualify in one of the 'exempt' categories, operate under a licence issued by the Gambling Commission (the Commission). Lottery operating licences are only issued to non-commercial societies and external lottery managers who promote lotteries on their behalf.
- 1.2** The Act contains provisions designed to make clear the distinction between lotteries, prize competitions and free draws. Although the Commission has no regulatory responsibilities in respect of competitions and draws, we nonetheless monitor the boundary between them and lotteries. We also have powers in respect of pursuing and prosecuting illegal gambling and will act where schemes are organised and promoted that, in our view, amount to unlicensed and therefore illegal public lotteries.
- 1.3** Reflecting all this, the Commission is publishing this advice relating to prize competitions and draws, and in particular where the boundaries lie between them and lotteries. The purpose of this advice is to make those organising competitions and draws aware of what the Commission considers is needed to avoid breaches of the Act.
- 1.4** Organisers of competitions and free draws should also be aware that although they fall outside the ambit of the Gambling Act, there are other rules and regulations in place that they need to consider when developing and running their schemes. These include unfair trading and consumer protection laws and tax implications.

2 The distinction between lotteries, prize competitions and free draws

- 2.1** The Act defines two types of lottery: a simple lottery and a complex lottery. A simple lottery is where:

- persons are required to pay to participate
- one or more prizes are allocated to the participants in the scheme
- prizes are allocated wholly by chance.

A complex lottery is one where:

- persons are required to pay to participate
- one or more prizes are allocated to the participants in the scheme
- the prizes are allocated by a series of processes
- the first of these processes relies wholly on chance.

- 2.2** Any scheme that falls within either of these definitions needs to operate within the statutory provisions relating to lotteries in the Act if it is to be organised lawfully. These provisions are described in the Commission's publications *Promoting society and local authority lotteries* and *Organising small lotteries* (Gambling Act 2005).
- 2.3** In prize competitions, success depends, at least in part, on the exercise of skill, judgment or knowledge by the participants. This distinguishes them from lotteries, where either success depends wholly on chance or, in a complex lottery, the first stage relies wholly on chance. Section 14(5) of the Act addresses this distinction.
- 2.4** An arrangement is a lottery only if the participants are required to pay to enter. Therefore free draws are not lotteries and are exempt from statutory control. Schedule 2 to the Act gives details of what is to be treated as amounting to 'payment to enter' for the purposes of distinguishing free draws from lotteries.

3 Prize competitions

- 3.1** As stated in paragraph 2.3 above, a prize competition is one where success depends on the exercise of skill, judgment or knowledge by the participants and does not, as it does in a lottery, rely wholly on chance. However, section 14(5) qualifies this distinction. It defines the circumstances in which arrangements requiring participants to exercise a degree of skill or judgment or to display knowledge are to be treated as relying wholly on chance. Such arrangements will therefore fall within the definition of a lottery provided the other elements of the definition (payment to participate and the allocation of prizes) are satisfied.
- 3.2** Section 14(5) says that 'a process which requires persons to exercise skill or judgment or to display knowledge shall be treated for the purposes of this section as relying wholly on chance if:
- (a) 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; and
 - (b) the requirement cannot reasonably be expected to prevent a significant proportion of persons who wish to participate in that arrangement from doing so.'
- 3.3** It follows from this that a genuine prize competition is one that contains a requirement to exercise skill or judgment or to display knowledge and where it can reasonably be expected that the requirement will either:
- (a) prevent a significant proportion of people who wish to participate from doing so (section 14(5)(b) of the 2005 Act); or
 - (b) prevent a significant proportion of people who participate from receiving a prize (section 14(5)(a)).
- If either one of these barriers to entry or success can be shown, the process will not be deemed to rely wholly upon chance, and the arrangement will not be a lottery.
- 3.4** Although the Commission can provide advice, only the courts can provide the definitive interpretation of the test in section 14(5) of the Act and decide whether or not an arrangement relies wholly on chance and consequently whether it is a prize competition or a lottery. With that proviso, the Commission offers the following advice as to the factors that will affect any decision we might take as to whether the statutory test has not, or may not have, been met.
- 3.5** First the intention of the law is clear: competitions that genuinely rely on skill, judgment or knowledge are to be permitted to operate free of any regulatory control under the Act. In many cases, it will be obvious that such competitions meet that test. A crossword puzzle, where entrants have to solve a large number of clues and where only fully completed entries are submitted, is an obvious example. Other types of word and number puzzles, such as those that feature in competition magazines, are further examples. The law makes

it clear that these qualify as prize competitions even if those who successfully complete the puzzle are subsequently entered into a draw to pick the winner.

- 3.6** At the other extreme, there are some competitions that ask just one simple question, the answer to which is widely and commonly known or is blatantly obvious from the material accompanying the competition. The Commission considers that these do not meet the test in the Act. It is not easy to say where the dividing line between the two extremes lies. The more questions or clues that have to be solved, or the more obscure or specialist the subject, the more likely it is that application of the statutory test leads to the conclusion that the competition is not a lottery. But we do think that the requirement to exercise skill or knowledge in the test in the Act is not met where the answer can be found easily 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.
- 3.7** In cases where it is not self-evident that the competition involves sufficient skill, judgment or knowledge, the test which must be applied is that in section 14(5) of the Act. In other words the test is whether there is a reasonable expectation that the skill, judgment or knowledge requirement would either deter a significant proportion from entering or prevent a significant proportion from receiving a prize. In the Commission's view, in practical terms, there are two elements to this test. Did the skill, judgment or knowledge requirement in fact eliminate a significant proportion from participation or success and, if it did not, on what basis did the organisers conclude it was reasonable to expect that it would have done so?
- 3.8** On the first of these, the Act gives no indication of how the phrase, 'significant proportion' is to be interpreted. It should therefore take its ordinary, natural meaning. The Commission does not intend to set and promulgate any specific figure as, in any particular case, what is a significant proportion is likely to depend on the context and facts of the case.
- 3.9** Regardless of whatever level is regarded as 'significant', there is a related issue of how the proportion is to be calculated. In cases where organisers wish to defend their competitions by reference to subsection 14(5)(a) of the Act, it may be fairly easy to measure the actual proportions of those who participate who are eliminated by the skill, judgment or knowledge element. Organisers who seek to rely on subsection 14(5)(b), may have a more difficult evidential task. The test is whether a significant proportion of people who wish to participate can be expected to be deterred from doing so: in such competitions people may not enter unless they are confident they can pass the skill, judgment or knowledge hurdle. It may not be easy, as a result, to determine the numbers who wished to participate, against which the numbers who do so would need to be compared to establish that the former is a significant proportion of the whole.
- 3.10** In cases where the Commission forms a preliminary view that a particular competition appears to fall on the wrong side of the test in section 14(5) and therefore appears to be an illegal lottery, we will in the first instance approach the organisers to allow them to explain why they think their competition is compliant. In doing so, the Commission will take full account of the fact that the test in the Act is whether the skill, judgment or knowledge element could 'reasonably be expected' (the words in section 14(5)) to have eliminated a significant proportion. In other words, the Commission acknowledges that organisers may be able to demonstrate that they had reason to believe that the skill, judgment or knowledge element would eliminate a significant proportion even though in the event it does not.
- 3.11** Organisers are advised to consider how they will be able to demonstrate that their competition would meet the test in section 14(5). For example, they may choose to carry out research to test types of questions with viewer or reader panels to establish if a significant proportion would be deterred from entering, or would get the answer incorrect. The results of these tests could be recorded and passed to the Commission in the event that a competition gives rise to any regulatory concerns. Organisers may also use statistics showing results of similar previous competitions as a means of being reassured about future ones.

- 3.12** Organisers who decide to carry out research will need to consider how the outcome of that research relates to the context in which the competition is offered, as this may have an impact on the required element of skill, judgment or knowledge. For example, asking a panel a number of questions without any accompanying information is likely to produce very different results from asking questions following a television programme in which the correct answer has been given. In such cases, the Commission will consider both research carried out in advance of the competition and the context in which the competition is offered when making a judgment on whether the test at section 14(5) of the Act has been met.
- 3.13** The onus lies on the organisers of competitions to satisfy themselves that their competitions are compliant with the law. Consequently the Commission thinks it reasonable to ask those organisers how they have come to that view in cases where we have concerns about the legality of schemes. We acknowledge that it is open to them to refuse to respond, preferring instead to reserve their defence for any possible prosecution. But the Commission thinks that an approach on the lines we suggest will help avoid pursuing cases to prosecution and allow organisers the opportunity to withdraw or alter schemes where the Commission has concerns, without resort to costly litigation. Organisers should not however interpret any lack of action from the Commission as indicating specific approval of a scheme, nor as precluding subsequent action if the Commission later considers the event to be an illegal lottery. Under no circumstances will the Commission give clearance for schemes.
- 3.14** In cases where the organiser can produce figures which show that the skill, knowledge or judgment element eliminated a significant proportion of either actual or potential entrants, the Commission would not envisage taking the matter further. But where such figures are not available or where they show an insignificant proportion have been eliminated, the Commission will seek to establish the basis on which the organisers came to the view that the competition would in fact do so.
- 3.15** It is then for organisers to decide whether, or to what extent, they respond. But the Commission is likely to be satisfied where the organisers can produce material that demonstrates that they have taken steps to estimate the likely proportion of potential or actual participants, who are, or will be, eliminated by the skill, judgment or knowledge element. Where they seek to rely on the argument that significant proportions of potential entrants have been deterred, the Commission considers it will not be sufficient to compare numbers of entrants with, say, the audience figures for the TV programme or the readership figures for the newspaper carrying the competition. More is needed, for instance evidence of the propensity of the audience to enter such competitions. Similarly, for a competition made available on the internet, simple website traffic statistics that show large numbers went to the site but did not enter it are not, in the Commission's view, sufficient to suggest a significant proportion of persons who wished to participate were deterred. Again some more sophisticated analysis is needed which in some way is indicative of the fact that potential participants were deterred.
- 3.16** Where the Commission does have concerns about the legality of a scheme, we may be willing to accept that a misjudgement may be made on the first occasion that a particular type of competition is organised where steps have genuinely been taken by the organisers to establish the way the competition will operate in order to avoid being an illegal lottery. But further promotion of competitions of the same or similar types in the face of evidence to suggest that the particular skill etc element does not deter or eliminate a significant proportion of potential or actual participants must be much harder to defend. Where, by its nature, a competition can only involve one high value prize, as for example in the case of house sale competitions, the organisers will need to take particular care to justify their expectation that they are offering a genuine competition as there will be no opportunity to build up market data in successive competitions. We particularly recommend that organisers of these 'one-off' competitions learn from the experiences of previous examples of similar schemes, especially where these have been shown to give rise to concerns.

- 3.17** As it will not always be easy to establish empirically that the test in the Act has been met, the Commission has developed a number of indicators that we will consider when assessing whether the skill, knowledge or judgment element is sufficient. This is not a prescriptive list and following one or more of these indicators does not mean a competition will fully meet the requirements of the Act. It is your responsibility to ensure you meet the test in the Act. Some of the indicators we take into account are as follows:
- where a competition uses a multiple answer format, whether there are sufficient plausible alternative answers
 - 'joke' answers are only used where there are sufficient plausible alternatives
 - the correct answer is not obviously given close to the question
 - the number of questions asked
 - the types of formats used, for example, complex logic or mathematical puzzles which are demonstrably not simple to complete
 - the cost of entry and/or the value of the prize; for instance the level of skill or knowledge needed to deter potential participants from entering a competition with a high value prize is likely to be greater than in the case where the value of the prize is low;
- 3.18** Schemes have been developed where some of the above elements are present, but where entrants are not required to pay until they give the correct answer. The Commission does not think these can be operated as prize competitions. The Commission considers that the test in the Act cannot be met as the element of skill, knowledge or judgment is not the determining factor in this type of scheme. The requirement for skill etc is negated by the fact that the participant does not have to pay until they are certain they have given the correct answer. In reality, the scheme splits into two parts, the first being the requirement to answer a question, and the second, which the participant only reaches if a correct answer has been given, a draw. Where entrants are in effect required to pay to enter that draw and then chance determines the winner of the prize, this second stage is a lottery. Even if the scheme cannot be split in this way, the Commission does not think the arrangement is likely to deter or eliminate a significant proportion of entrants as required by the test in the Act.
- 3.19** Ultimately however, the test remains that contained in the Act. If operators believe there is a risk of their competition being challenged as an illegal lottery, they will need to consider how they will be able to provide evidence of compliance, for instance by demonstrating from their records that a significant proportion of entrants either in that competition, or previous similar ones, had got the answers wrong. While it is a defence for a promoter that 'he reasonably believed that ... the arrangement to which the charge relates was not a lottery' (sections 258(4)(b) and 259(4)(b)), promoters are expected to take steps to satisfy themselves that the requirements of the law are met. In our view that includes the need to consider our advice and whether specific legal advice is required.
- 3.20** Finally, competition organisers will need to consider whether their competition may involve betting as defined in section 9(1)(c), as applied by section 11 of the Act. These provisions are designed, amongst other things, to ensure that prediction competitions, such as 'fantasy football' games, are regulated as betting products and thus can only be offered under a relevant betting licence. However, a bet is defined by section 9 to include making a bet on 'whether anything is or is not true' and other competition organisers beyond those running 'fantasy football' type schemes will need to consider whether they are caught by this definition and thus whether their schemes involve betting.

4 Free draws

- 4.1** As stated in paragraph 2.4 above, an arrangement is a lottery only if the participants are required to pay to enter. Therefore, free draws always have been and remain exempt from statutory control. Schedule 2 to the Act gives details of what is to be treated as amounting to 'payment to enter' for the purposes of distinguishing free draws from lotteries.

- 4.2** The schedule envisages two circumstances. First, cases where there is only one entry route. Here, 'free' will include any method of communication (post, telephone or other) at a 'normal rate'. 'Normal rate' is defined as 'a rate which does not reflect the opportunity to enter a lottery' (paragraph 5(2)(a) of Schedule 2). It includes 'ordinary first-class or second-class post (without special arrangements for delivery)' (paragraph 5(2)(b)). There can be no additional payment over what it would normally cost to use the particular method of communication. Any competition that fails this test is deemed to require 'payment to enter' and will be a lottery if the other two elements (chance and prizes) are also present.
- 4.3** Secondly, cases where there is a choice of entry. Here, the arrangement will not be treated as requiring payment to participate in the arrangement and so will not be a lottery, if:
- each individual who is eligible to participate has a choice whether to do so by paying or by sending a communication
 - that communication is either:
 - a letter sent by ordinary post, again whether first or second class post
 - or some other method which is neither more expensive nor less convenient than entering by the paid route. Again this method must be charged at the 'normal rate'; there can be no additional payment over what it would normally cost to use that method of communication
 - the choice is publicised so that it is likely to come to the attention of all those intending to participate
 - the system for allocating prizes does not distinguish between those using either route.
- 4.4** In both circumstances, the requirement to pay in order to participate also includes cases where there is 'a requirement to pay in order to discover whether a prize has been won under an arrangement' (paragraph 6 of Schedule 2 of the Act) and cases where there is 'a requirement to pay in order to take possession of a prize' (paragraph 7 of Schedule 2).
- 4.5** For the purpose of clarity:
- the implication of the second bullet point of paragraph 4.3 above is not that, if a competition organiser establishes two equally prominent and convenient methods of paying for entry and one costs less than the other, that is sufficient for the competition to meet the requirement. Both means of entry in such a case involve payment and the scheme will be a lottery. For the scheme to qualify as a free draw, the alternative route must itself meet the test in paragraph 5 of Schedule 2 (see paragraph 4.2 above)
 - it is not sufficient to avoid classification as requiring 'payment to enter' that the alternative route costs the same as or less than ordinary first or second class post. To qualify as 'free', that route must still involve payment at no more than the 'normal rate' for that type of communication.
- 4.6** There have been advances in recent years in the numbers of different ways in which people communicate with each other. In addition to post and landline telephones, many people use mobile phones, text services, emails and other web based systems. The circumstances in which these do or do not involve 'payment to enter' a competition as defined in the Act will inevitably depend on the context and facts of each case. The following principles will however be relevant in reaching decisions in individual cases:
- (i) It is irrelevant to whom the payment is made or who benefits from any payment (paragraph 3 of Schedule 2 of the Act). Hence, if a competition organiser makes no charge for entry but the telecommunications company does, over and above the 'normal rate' that still involves payment as defined in the Act.
 - (ii) The test to be applied where there is a choice of entry is that set out in paragraph 4.3. Hence, to qualify as a method which does not involve payment, it is not sufficient that the alternative route costs nothing for those who use it. It also has to be such that, for

instance, individuals wishing to participate have a choice whether to use the alternative route and it is no less convenient than the paid route. As an example, many people do not have ready access to the internet at home. Although, for many of those that do, use of it costs nothing in the sense that they pay a single amount for access and nothing for subsequent use, others cannot access it, at least quickly. A competition which offers an alternative 'free' entry route via the web may not offer substantial proportions of those who wish to enter a genuine choice or at the very least that alternative may not be as convenient for them as the paid route. This is particularly the case where the need for immediate responses is emphasised to enable the participants to win the prizes on offer or the competitions are run only for relatively short periods. Reflecting all this, the Commission has developed the following principles, which we intend to use as a guide when considering whether web entry is a sufficient alternative route for those who seek to use it:

- potential participants who do not have home web access need sufficient time to gain web access elsewhere. The Commission considers three working days around the date of the particular draw as a reasonable length of time to obtain such access
- participation by web access should be available at all times while the scheme is being actively promoted and until the closing date/time for entries. Therefore, a quiz taking place during a television programme should permit web entries while the programme is being aired if entries by other means are permitted at that time as well
- the availability of free entry via the web should be made widely known, for example as the general policy for schemes organised by the operator concerned
- where any doubts exist as to whether the web entry arrangements in any particular case fully satisfy the Act's requirements, other routes, for example by post that has been specifically sanctioned by Parliament, should be offered in addition.

(iii) The test for whether a charge is at the 'normal rate' is whether or not it reflects the opportunity to enter the competition. This is a question of fact in each case. However, it is irrelevant to this test whether different methods of communication cost different amounts. For instance, different mobile phone operators have different tariffs. The fact that, as a result, some participants pay more than others for their call to enter a competition does not affect the question of whether or not that method involves 'payment to enter'. The test is rather whether the cost of the call includes an element which involves a payment to enter the competition. Therefore, if the cost of the call is what the user pays for any call to any other non-commercial user that is 'free' in the terms of the Act, regardless of who gets the payment and even if some part of that payment goes to the organiser of the draw. But if the call is charged at a tariff which includes an element of paying for a service (in this case, entering the competition), that involves, in the Commission's view, a payment, for the opportunity to enter, again regardless of who benefits from that element of the payment. Here there is some additional payment over that which relates to the provision of the telecommunications facilities.

(iv) As a general rule, the Commission does not think that the 'provision of data' by individuals amounts to 'payment' as intended by the Act. For instance, some organisations reward those who complete a survey form by entering them in a draw for one or more prizes. The Commission is of the opinion that such arrangements do not involve payment as that term is defined in paragraph 2 of Schedule 2 to the Act. In particular the Commission will not seek to argue that proportionate requests for data amount to payment because they involve 'transferring money's worth' (paragraph 2(b) of Schedule 2). The position might be different where large quantities of data are requested before entry to the draw takes place, particularly where data is obtained in circumstances where it is intended to be sold to third parties.

- (v) As stated in paragraph 4.4, the definition of ‘payment to enter’ includes cases where there is a requirement to pay to collect the prize. In the Commission’s view, that does not mean that prize winners cannot be required to pay normal delivery or other normal costs needed to obtain or use the prize. For instance, the Act’s provisions do not, in the Commission’s view, prevent the organiser of a competition in which a camera is a prize requiring the winner to pay normal delivery costs which might be charged if that same camera was bought from a retailer. Nor, clearly, does it prevent the winner of a car being required to pay road tax. But there can be no additional payment over what it would normally cost to pay for delivery or use.

- 4.7** As with prize competitions, in cases where the Commission forms a preliminary view that a particular scheme does not satisfy the requirements to qualify as a free draw, we would expect in the first instance to approach the operator to allow them the opportunity to explain why they think the arrangement is compliant. As has been said, in cases where there is a choice of entry route, any conclusion must focus on whether the arrangement satisfies the test set out in paragraph 4.3 above. But the Commission takes the view that it is not unreasonable to use, as a starting point, the proportion of entrants who have made use of each of the routes. Whilst such a test cannot be determinative one way or the other, in cases where operators are able and willing to provide such information, the Commission will see it as a relevant factor in reaching any conclusion as to whether or not the scheme is compliant with the law.
- 4.8** Finally, Schedule 2 to the Act also makes provision for product promotions. These are permitted where the price of the good or service does not include any element that reflects the opportunity to participate in the promotion (paragraph 2(c) of Schedule 2). Therefore draws tied to product promotions are not to be treated as requiring payment to enter and are not to be regarded as lotteries, so long as entry involves no cost beyond the cost of the product. Whether this is, or is not, so will be a question of fact in individual cases. As a general rule, a good linked to a promotion charged at a price that bears little relation either to its cost of production or to comparable products may mean the promotion will be challenged as an illegal lottery. On the other hand, an increase in price just before or coincident with the introduction of a promotion need not necessarily give rise to difficulty if it can be shown that the price rise is unrelated to the promotion itself, for instance because of higher costs of such things as raw materials or transport.
- 4.9** The Commission acknowledges that ultimately the costs of any product promotions must be recovered through the revenues obtained from sales. However, the test is whether an identifiable element within the price of the product during the promotion can be said to be a participation fee. Organisers do need to bear in mind that a promotional ‘free draw’ will involve payment, and as a result will be an illegal lottery, if a charge is made to discover whether a prize has been won or to take delivery of that prize (see paragraph 4.4 as qualified by paragraph 4.6 (v)).
- 4.10** An example of a typical product promotion is a scheme where persons buy a particular product at its usual price, such as a chocolate bar or magazine, and as a result they are given the chance to win a prize. Another example is where a retailer offers its customers the chance to win something, such as a discount, when they make a purchase.

5 Deciding whether to institute criminal proceedings

- 5.1** If the Commission considers that what is in fact being offered is an illegal lottery, and/or we are unable to reach an appropriate outcome through discussions with the operator as set out above, we have the option to take forward criminal proceedings.
- 5.2** The following outlines our approach to deciding whether or not to institute such proceedings and is taken from our Licensing, Compliance and Enforcement Policy Statement, which provides more detail.

- 5.3** The Commission will apply the Code for Crown Prosecutors when deciding whether criminal proceedings should be commenced, which involves a two-stage test:
- first, the evidence will be reviewed and an assessment made as to whether there is a realistic prospect of conviction
 - secondly, if there is sufficient such evidence, an assessment will be made as to whether it is in the public interest for a prosecution to take place.
- 5.4** The Code for Crown Prosecutors lists a number of common public interest factors which either favour or are against prosecution. A copy of the code can be found on the Crown Prosecution Service's website and in the event that the Code is revised the Commission may need to review its own processes accordingly.

Gambling Commission, December 2009

Keeping gambling fair and safe for all

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