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Nick White, Couchman Harrington Associates

“Gambling Promotion and Advertising on TV”

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We have recently been engaged to advise on the establishment of a new television channel which the owners intend will be funded to a large extent by adverts and programme sponsorship for gambling services. As part of the brief we were also asked to consider the use of viewer competitions as promotional tools on the channel, and the treatment of viewer contributions such as texts and phonecalls. This short article touches on some of the myriad of legal and regulatory issues that come into play when considering such a brief.

Readers will recall the furore earlier this year following revelations of the mishandling of various TV and radio phone-ins and competitions. Ofcom imposed fines of £5.67 million and £400,000 on ITV and BBC respectively earlier this year for their part in the scandals. Competitions were being decided arbitrarily and unfairly with winners being chosen because they sounded “lively” and numerous competition results being falsified or faked.

Around the same time, both the broadcast regulator Ofcom and PhonepayPlus (previously, ICSTIS) brought through measures aimed at reducing the possibility of such incidences occurring again. PhonepayPlus issued a notice on 18 March stating that no Broadcast Premium Rate Services (“BPRS”)¹ could be provided without the provider having the written permission of PhonepayPlus to provide those services. Then, on 9 May, Ofcom brought into effect a new broadcast licence condition (“*Requirements for the handling of communications from viewers*”). *Inter alia*, that new condition required the independent third party verification of all systems used in providing premium rate services. This verification requirement mandates a review of all systems in place and confirmation that they will result in the “*fair and consistent treatment*” of all eligible votes and entries. The third party must also review with appropriate regularity the broadcaster’s programmes and as part of such review must track all votes or entries to ensure they are properly and fairly dealt with.

Our advice was therefore provided in the context of this new, increasingly regulated, environment. The treatment of viewer contributions such as texts and phonecalls is fairly straightforward: all texts and calls must be given a reasonable chance of being used and systems in place must be sufficient to handle such volumes as may arise. However, the treatment of viewer competitions is slightly more complicated. While being mindful of the tighter regulatory regime, we needed to help our client ensure that any promotions it might run on the channel would not be classed as lotteries under the Gambling Act. In general, lotteries are prohibited under the Act unless the promoter has a licence to run them. Conversely, prize competitions and free draws are outside the statutory control of the Gambling Act and can be conducted without a licence.

Turning to what constitutes a lottery, an absolute requirement is that there is a “payment to participate”². Even where there is no obvious “payment to participate”, there is a potential issue where participation is via media such as phone and text, the use of which requires some sort of financial outlay by participants. For example, if a promotion is run requiring participation by text

¹ BPRS are defined as follows: “Premium rate services which are promoted on television (other than by commercial advertising), however transmitted, and which provide a facility for interaction or the provision of information whether in the form of votes entries bids or otherwise howsoever.”

² For more on the issue of “payment to participate”, see the Gambling Commission’s *Prize competitions and free draws: The requirements of the Gambling Act 2005*

and the participant must pay more for sending that text than the standard network charge, it is likely that the promotion requires “payment to participate”.

In circumstances where the first lottery requirement of payment to participate is met, particular care must be taken to ensure that the other requirement for a lottery – success of the participant relying wholly on chance – is avoided. While on the face of it, this should be fairly straightforward by, care must be taken to ensure that the requisite threshold is exceeded. The Gambling Commission has stated in its guidance on the matter that the relevant test to be applied is that in section 14(5) of the Gambling Act. In other words, is there “*a reasonable expectation that the skill, judgement or knowledge requirement would either deter a significant proportion from entering or prevent a significant proportion from receiving a prize*”? Of course, there must be a measure of subjectivity in assessing whether the requirement meets this criterion. Accordingly, it is sensible as a general rule to err on the side of caution and ensure that the, e.g., question used is difficult enough to have the requisite deterrent/preventative effect.

So far we have looked at issues arising from viewer contributions and interactivity. Our client was also concerned to ensure that the advertising it showed was fully compliant. Before the full implementation of the Gambling Act on 1 September 2007, the advertising of gambling on television was – with the exception of interactive TV – prohibited. The implementation of the Act and the ushering in of a new regime under the Gambling Commission saw gambling advertising “legalised”, albeit subject to restrictions. The BCAP³ TV Code sets out a number of different rules aimed at ensuring that gambling advertising is lawful and responsible. The Code specifies for example that gambling advertisements must not encourage gambling that is socially irresponsible, must not exploit the susceptibilities of children and so on. A further layer of regulation (albeit self-regulation) comes via the Gambling Industry Code For Socially Responsible Advertising. This specifies that “*new gambling products (NB not those, such as bingo, that were permissible prior to 1 September 2007), should not be advertised on television before the commonly accepted watershed time of 9.00pm*”. The exception to this rule is that advertising for sports betting is permitted before the watershed around televised sporting events.

As part of our brief, we were also required to analyse the treatment of spread betting⁴. Spread betting, which obviously carries greater risks than fixed odds betting, is regulated by the Financial Services Authority, as opposed to the Gambling Commission. The rules on spread betting advertising are accordingly more stringent than those relating to other gambling activities. Section 9.5(b) of the BCAP TV Code specifies that spread betting may be advertised, “*as an investment on specialised financial channels or in specialised financial programming⁵ or on interactive or additional TV services (including text services) only. Spread betting advertisements must comply with the gambling rules (see rule 11.10).*” As an aside, note that the sponsorship of television programmes is classed as advertising under section 327 of the Gambling Act 2005. Accordingly, the same considerations as apply to advertising will apply to broadcast sponsorship.

As well as the gambling-specific advertising rules and regulations, some of which we have looked at above, it is of course necessary for broadcasters to comply with the general rules on advertising. These include Ofcom’s Rules on the Amount and Distribution of Advertising. The content of these rules is outside the scope of this article but the basic rules can be briefly summarized: The total amount of spot advertising on a channel must not exceed an average of 9 minutes per hour of broadcasting time (i.e. 15%) and in any one clock hour there must be no more than 12 minutes of advertising spots.

³ British Committee of Advertising Practice

⁴ A Spread Bet is defined in the glossary to the FSA Handbook as a contract for differences that is a gaming contract, where gaming is the playing of a game of chance for money or money’s worth.

⁵ “*Specialised financial programming*’ is defined as programming that is likely to be of particular interest only to business people or finance professionals.” (See note (2) to Section 9.5 of the BCAP TV Code).

One interesting and thorny issue is that of the broadcasting from within Great Britain of a channel containing gambling advertising into other European countries. This is a real concern for broadcasters seeking to run channels with gambling and spread betting adverts and promotions because Great Britain's gambling and gambling advertising regime is fairly liberal when compared to those of some other European jurisdictions. A number of European countries would not permit broadcasters licensed under their own regimes to show the gambling advertisements that are allowed in Great Britain. The key point here is that it seems that the Country of Origin principle⁶ – that a broadcaster is only bound by the rules and regulations of the country in which it is licensed – should hold true. Therefore it should be the case that a broadcaster licensed by Ofcom need not additionally comply with the rules and regulations of any of Ofcom's overseas European counterparts. While in an ideal world, one would make this point with greater force and certainty, it simply is not possible to second guess what view the authorities in, for example, The Netherlands or Greece, might take.

Needless to say, we have touched on only some of the issues that face our client and that will face other entities in similar situations. However, hopefully in doing so, the reader will have gained a better flavour of the legal and regulatory regimes that apply at the interface between gambling and broadcasting.

Nick White, Couchman Harrington Associates

nick.white@couchmanharrington.com

⁶ The principle is espoused in the Audiovisual Media Services Directive 2007/65/EC