

MISLEADING ADVERTISING AND UNFAIR PROMOTIONS – REGULATORS ARE UPPING THE ANTE



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As part of its focus on consumer protection and the “fair and open” licensing objective, the UK Gambling Commission (the “Commission”) has recently begun imposing penalties on operators due to advertising failings which it considers have resulted in customers being misled. In April 2017, the Commission concluded its review of BGO Entertainment’s licence which followed two rulings against the operator by the Advertising Standards Authority (“ASA”), one of which related to failing to make significant conditions of free bet offers clear to customers. A £300,000 financial penalty was imposed. Then, in June 2017, the Commission published an agreed public statement in connection with advertising failings by Lottoland, which again followed a complaint being upheld by the ASA. Lottoland agreed to a voluntary settlement of £150,000.

Similar issues with misleading adverts and promotions have now also led to enforcement action against several gambling operators by the Competition and Markets Authority (“CMA”). On 23 June 2017, the CMA announced that it was commencing action against operators which it considered had broken the law by imposing unfair play-through conditions and game rules, and failing to provide clear information to customers. In a statement by Nisha Arora, Senior Director for Consumer Enforcement, the CMA indicated that it considered “the dice are loaded against [customers]”.

As shown by its action following ASA rulings, the Commission may have the appetite to commence its own regulatory action against the operators under investigation, following whatever action is taken by the CMA. Gambling Commission Chief Executive Sarah Harrison warned that “the gambling industry should be under no illusion that if they don’t comply with consumer law, we will see this as a breach of their operating licence, and take decisive action”.

The issues which led to both the ASA action against BGO and the CMA action against the as-yet unnamed operators stem from

the terms and conditions applicable to free bet and bonus promotions. Whilst the ASA focuses on whether significant conditions of promotions are made clear to customers, the CMA's remit relates more to the fairness of the conditions themselves. The outcome of the CMA cases is not yet known, but it is likely that it is considering both the content of the conditions and the way in which they are presented to customers, as unfairness can arise from complexity and bad presentation of T&Cs as well as from their provisions.

The Commission's powers

Compliance with the provisions of the CAP and BCAP advertising codes which relate to making significant conditions of an offer clear is a "social responsibility code provision" within the Licence Conditions and Codes of Practice ("LCCP") applicable to a UK operating licence. Unlike the lower status "ordinary code provisions" of the LCCP, compliance with social responsibility code provisions is a condition of the licence. This means that any breach of these provisions can lead to a licence review and financial penalty or even suspension or revocation of the licence in the most serious cases.

Compliance with the remainder of the CAP and BCAP advertising codes (including the gambling specific provisions such as that advertising must not be socially irresponsible or appeal to children) is an "ordinary code provision", which means that non-compliance is not a breach of the licence. However, compliance is regarded as good practice and failure to comply may be taken into account should a licence review take place for other reasons. Non-compliance with an ordinary code provision cannot, in itself, lead to a financial penalty.

The Commission also has a broad remit to review an operating licence in any circumstances where it suspects the licensee may be unsuitable to carry on the licensed activities. Both the BGO and Lottoland cases involved misleading advertising and therefore breaches of the social responsibility code provision. However, in the future the Commission might conduct licence reviews due to serious breaches of other advertising provisions or more generally in relation to failure to promote the "fair and open" licensing objective, on the basis that the conduct by the licensee has put its suitability into question.

In the past, the ASA's powers have been seen as lacking teeth, given that it is limited to telling the advertiser not to repeat the offending advert, but if the Commission continues to use its powers to review licences following advertising breaches, a much wider range of sanctions are available for non-compliance by gambling operators. The CMA, by contrast, does have a remit to take court action in relation to infringements of consumer protection laws and can obtain an order for a business to compensate affected customers or pay equivalent amounts to charity.

CMA action

The issues which led to the CMA action against operators related to:

- Play-through conditions attached to sign up bonuses, requiring customers to complete extensive wagering requirements before being allowed to withdraw money;
- Inadequate or unclear information about the restrictions and conditions that apply to promotions before sign-up; and

- Potentially unfair rules that restrict certain play strategies, which operators rely on to deny customers a pay-out.

The CMA's concerns primarily relate to unfairness to the customer, for example customers being unable to properly evaluate whether they should take up an offer due to inadequate information being provided. However, there is also a social responsibility element to the CMA's concerns. Extensive play-through requirements raised the concern that customers are being denied "the opportunity to quit while they are ahead and walk away", the implication being that problematic gambling behaviour may be encouraged by the need to play through a bonus amount a large number of times in order to withdraw the amount in cash.

The CMA stated in relation to this action that it has "a range of powers at its disposal to bring any illegal activities to an end". To put this into context, the CMA's consumer protection powers include:

- Civil powers to stop infringements under the Consumer Protection from Unfair Trading Regulations 2008 (CPRs) and Consumer Rights Act 2015 (CRA), by seeking an enforcement order from the courts.
- Criminal powers to prosecute businesses that engage in the most unfair commercial practice under the CPRs.
- The power under Schedule 3 of the CRA to seek an injunction to stop businesses using unfair terms.

The CMA indicates in its Consumer Protection: Enforcement Guidance document that before taking court action it will normally attempt to stop and prevent repetition of what it considers to be an infringement by consulting with the business. The CMA also highlights that it is committed to proportionate regulation, this statement being backed up by the fact that only twelve consumer enforcement cases over the past decade have led to court orders, with these cases relating to issues such as illegal pyramid schemes and fraudulent sales practices, or businesses refusing to make the requested changes to their practices.

A recent area of consumer enforcement work by the CMA was an investigation into retailers involved in publishing fake positive customer reviews and suppressing negative reviews. One retailer, which had instructed staff members to only approve reviews of four stars and above, agreed to give undertakings to the CMA which included that it would publish all genuine reviews. Another retailer, which had arranged for third parties to write positive reviews, again reached agreement with the CMA to give undertakings not to continue this practice. The case against both retailers was closed following the relevant undertakings being given.

In light of the guidance document published by the CMA and the outcome of this recent consumer enforcement action, it seems likely that the cases against the gambling operators will be resolved in a similar way, with them giving undertakings not to continue or repeat the concerning type of promotional activity, rather than any formal court action taking place.

ASA action

Of the 38 adverts by gambling operators which were subject to rulings by the ASA in the past year, 30 raised issues relating to

misleading advertising and/or failure to make significant conditions of a promotion clear. It appears from these numbers that adverts giving misleading information about free bets and promotions have been a particular issue, but in fact a very similar proportion – around 80% – of all the ASA's rulings in the past year looked at issues relating to misleading advertising.

These statistics can be read in two ways – is it that advertisers are generally able to keep their adverts from being offensive or harmful but struggle to make conditions of their offers clear, or is it that consumers in the UK are more likely to complain about being misled or cheated than they are about being offended or harmed? Whichever is the case, the focus on misleading advertising by the ASA mirrors that by the Commission on the “fair and open” licensing objective and the CMA's enforcement action.

The key CAP and BCAP code provisions in this area are:

3.1 - Advertisements must not materially mislead or be likely to do so.

3.2 - Advertisements must not mislead consumers by omitting material information. They must not mislead by hiding material information or presenting it in an unclear, unintelligible, ambiguous or untimely manner.

3.10 - Advertisements must state significant limitations and qualifications. Qualifications may clarify but must not contradict the claims that they qualify.

Within the last year, the following types of conditions were all held by the ASA on at least one occasion to be significant enough to appear in the advert itself as well as the T&Cs:

- Play-through requirements e.g. that a bonus must be wagered 20 times before winnings may be withdrawn;
- Limitations on the type of bet that are eligible for an offer or bonus, including that they must be at certain odds, at the starting price rather than current price, or that they must be accumulator bets;
- Limitations on when customers can use a “cash out” feature, when the advert implies they can use it whenever they want to;
- The fact that a bonus takes the form of free bets or spins rather than cash, where the advert indirectly implies the bonus may be withdrawn immediately in cash;
- Maximum free bet stake rules, including a case where bets using bonus funds were void if they exceeded 30% of the bonus amount;
- Limitations on the time an offer will run for including expiry dates and time of day restrictions;
- Where winnings from a promotional bet are paid as free bets rather than cash.

The Lottoland advert, which ultimately led to the voluntary

settlement with the Commission, was a radio advert which the ASA considered misleadingly implied that customers would be participating in a lottery rather than betting on the outcome of a lottery. Whilst the term “bet” was used in the voiceover, the initial statements that “at Lottoland the EuroMillions still costs just £2” and “with Lottoland you can win the big jackpot for less” created a misleading impression. This is a somewhat different complaint to those against other operators as it did not relate to bonus terms, however it did deal with the failure to make key information clear to customers.

The overall takeaway is that any matter which a customer would reasonably expect to be aware of before making a decision whether to take part in a gambling opportunity must be displayed in the advert itself, rather than in linked T&Cs.

Safety in numbers?

Most gambling operators, particularly those licensed by the Commission, have broadly similar conditions attaching to free bet and bonus promotions. For example, extensive wagering requirements are commonplace as is the ability to void bets or refuse to pay out winnings if irregular betting patterns are discovered. It is unlikely that those operators currently subject to CMA action were doing anything particularly out of the ordinary. Once the results of the CMA action are made public, operators will have certainty as to the changes that need to be made, but in the meantime it is certainly worth reviewing terms with a view to heading off further action.

In terms of advertising, again given the volume of ASA rulings in this area it is not uncommon for a gambling operator to fail to make all of what the ASA considers to be “significant conditions” clear in every advert. Despite these failings not being uncommon, immediate action to rectify the issues in future adverts is essential. The reason BGO's advertising failings led to a licence review was because it did not take prompt action to address the issues and prevent recurrence – the Commission continued to find breaches in BGO's advertising for a number of months after it engaged with the operator on this issue.

Whilst further action by the CMA cannot be ruled out (and it is turning its attention to unfair withdrawal policies next), if operators take prompt action to amend their bonus terms both now and once its rulings and the operators' undertakings are made public, they may avoid similar action and potential investigation by the Commission.

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Melanie Ellis is a senior associate in the gambling law team at Harris Hagan. After graduating from St Hilda's College, Oxford in 2003, Melanie trained as a barrister before joining Harris Hagan in 2005 and qualifying as a solicitor in 2008. Melanie has developed expertise in dealing with all aspects of gambling law advising major casino operators, online betting and gaming operators and start up companies. She has advised on establishing operations in the UK and in offshore jurisdictions, on issues relating to advertising in the UK, on lotteries and prize competitions and 'due diligence' on the licensing aspects of corporate acquisitions. She regularly contributes to gaming law publications.