

# AFFILIATE MARKETING: ENSURE YOU ARE PROTECTED

As the Gambling Commission's recent actions on Lottoland and BGO clearly showed, there is no question operators must take full responsibility for the marketing activities of their affiliates. **Francesca Burnett-Hall** of Harris Hagan outlines the steps they should take to stay on the right side of regulations.

**In her World Regulatory Briefing address** at ICE Totally Gaming in February 2017, the CEO of the Gambling Commission, Sarah Harrison, stated: "My message to operators...the affiliates who promote your brand and who drive business to your websites are your responsibility, and it is you who are accountable."

Great Britain has the largest regulated online gambling market in the world, making it highly attractive both to gambling operators and those operating affiliate websites. Affiliates, which drive traffic to online gambling websites through their advertising of operators' services, do not currently require a Gambling Commission operating licence for their marketing activities.

Affiliates play a crucial role for operators and, as an important source of income, can be the difference between whether an operator succeeds or fails. However, affiliates also present a real risk of damaging operators' businesses, and the gambling industry's reputation generally, if their advertising is irresponsible or does not comply with the Gambling Act 2005 or the Commission's requirements.

The Commission's Licensing, Compliance and Enforcement under the Gambling Act 2005: Policy Statement, published in June 2017, provides measures aimed at enhancing consumer protection. Operators are urged to put customers first, treat them fairly and protect the most vulnerable to build consumer trust and confidence.

In relation to advertising, "putting customers first" involves making sure that advertisements are socially responsible and

include all significant terms and conditions a customer would want to be aware of before deciding whether to take up the advertised offer.

## Regulatory requirements

The operator's ultimate responsibility for marketing, including that of its affiliates, is demonstrated in the Commission's recent decisions on BGO and Lottoland.

The Licence Conditions and Codes of Practice (LCCP) provides that the advertising of gambling products and services must be undertaken in a socially responsible manner and must comply with the UK Advertising Codes, namely the CAP Code, BCAP Code and the Gambling Industry Code for Socially Responsible Gambling, issued by the Industry Group for Responsible Gambling (ordinary code provision 5.1.6). Some of the key requirements of these advertising codes are that:

- advertisements are legal and are not misleading;
- advertisements and promotions are socially responsible;
- care is taken not to exploit children and other vulnerable persons; and
- advertisements are not targeted towards under 18s.

Operators must ensure that their marketing communications and advertisements are not misleading and, particularly in relation to free bets, bonuses and similar offers, that they follow the CAP and BCAP guidance by stating significant limitations and qualifications and any terms and conditions, ideally within the advertisement itself (social responsibility (SR) code provision 5.1.7).

Advertising carried out by affiliates is also caught by these requirements (SR code provision 1.1.2).

In relation to digital advertisements, the Commission introduced a new licence condition (16.1.1) in 2016 which expressly requires operators to take all reasonable steps to ensure that third parties do not place digital advertisements on websites providing unauthorised access to copyrighted content; this is in addition to an absolute requirement that operators do not do so themselves. The terms of their contracts with third parties must allow them to terminate the contract if, in their reasonable opinion, the third party has placed digital advertisements of the operator's activities on such websites.

Under SR code provision 1.1.2 of the LCCP, operators must take responsibility for third parties with whom they contract regarding their licensed activities, ensuring that the terms of their contract:

- require the third party to conduct themselves as if they were bound by the LCCP;
- oblige the third party to provide them with the information they need to comply with their information reporting and other obligations to the Commission; and
- allow the operator to terminate the contract if the third party breaches the contract or otherwise acts in a manner inconsistent with the licensing objectives.

Although affiliates have their own responsibility for complying with the advertising codes, the Advertising Standards Authority (ASA) has made it clear that even where affiliates have complete freedom over their marketing activities, gambling operators cannot "absolve them[selves] of the responsibility for ensuring that marketing communications, that they ultimately reap the benefits of, comply with

the advertising rules...When it comes to... affiliate marketing of gambling products, primary responsibility for observing the CAP Code remains with the gambling operator". The ASA has repeatedly ruled that both the operator and affiliate are responsible and accountable for non-compliant advertising, even where the advertisement was the sole creation of the affiliate.

**The Commission’s recommendations to operators**

Achieving greater oversight and control over affiliates is complex for two reasons:

***“There are steps operators should and must take to protect themselves from potential breaches. Ultimately this is essential to protect the operator’s most valuable asset: its licence”***

**Recent Commission investigations**

In September 2016, the Commission began a review of BGO’s operating licence on the basis that BGO, and its affiliates, had breached Commission requirements by publishing misleading advertisements. BGO made changes to its advertising in July 2016 to ensure it was no longer in breach, however, its affiliates continued to place misleading advertisements. The Commission’s review was commenced after BGO had remedied its own breaches, but this was not enough to prevent the Commission giving BGO a formal warning and a weighty financial penalty of £300,000.

More recently, the Commission investigated misleading advertisements broadcast by Lottoland and its affiliate, MyVoucherCodes. Both were found to be publishing misleading advertisements and MyVoucherCodes had also failed to include significant limitations and qualifications in a direct marketing email, even though there was space to include them.

Unsurprisingly, in the public statement the Commission said: “Lottoland is responsible for the marketing and advertisements published by its affiliate, MyVoucherCodes, on its behalf to promote its products.”

Perhaps most interestingly, the public statement confirmed that Lottoland had terminated its contracts with a “significant number” of affiliates, in order to have greater oversight and control of its affiliates’ marketing material.

1. the sheer number of affiliates, with some operators having more than 5,000; and
2. the multiple locations in which affiliates are based.

In most cases, it simply will not be practical to review each and every advertisement before publication. However, there are steps operators should and must take to protect themselves from potential breaches. Ultimately this is essential to protect the operator’s most valuable asset: its licence.

The Commission set out several good practice recommendations in the Lottoland public statement, and we would strongly recommend that operators, as a minimum:

- conduct their own due diligence of affiliates before contracting with them;
- ensure that the terms and conditions of contracts with affiliates are clear and robust, that the affiliates are contractually obliged to comply with LCCP requirements and that there is a right to terminate the contract where an affiliate has not advertised responsibly;
- ensure that affiliates are aware of, understand, and are complying with the advertising codes by preparing and distributing guides to them;
- consider the inherent risks in using affiliates to attract customers via direct marketing and, where a customer has self-excluded, take immediate steps to ensure that affiliates remove them from their marketing databases;

- ensure their affiliate managers keep affiliates updated with any promotions and changes to terms and conditions;
- ensure affiliates’ advertisements make their commercial intent clear;
- conduct regular sample audits of affiliates’ advertisements and other marketing material, such as direct mailings, to ensure that they are socially responsible, are not misleading or targeted towards under 18s and do not exploit children and other vulnerable persons; and
- encourage affiliates to use the (free and paid for) copy advice service provided by CAP and the ASA if they are in any doubt about the content of their marketing copy.

These Commission guidelines, together with the BGO and Lottoland decisions, are the clearest indication of the legal and regulatory requirements of affiliate marketing and the dangers of non-compliant advertising. While affiliates are essential to business growth and consumer protection, upholding the licensing objectives and LCCP compliance must take first priority, otherwise affiliates pose a genuine and serious risk to operators.

Affiliates also need a reality check. If issues persist in this area, the Commission may reconsider its stance that affiliates do not require a licence. To secure compliant advertising it could decide to introduce a new licence which would be subject to review and revocation. Given the cost of regulation and licensing, this would inevitably reduce the number of affiliates but would give operators the confidence that the necessary standards are being maintained. However, an inevitable consequence of increased regulation may be that operators would lose valuable affiliates who are not willing to put their neck on the line.



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